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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1991

Cheryl Sorrell, Marty DeLane, Joseph McQueen, Mark Berry, Ron Severt and Tammy Silvey,

Petitioners,

v.

The Dayton Women's Health Center, Inc., K. W. Davis, Md., and Robert Skipton, Md.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Whether a permanent injunction based upon the content of the speech and not narrowly tailored to serve a compelling state interest may prohibit peaceful assembly, picketing, leafleting and other free speech activity on public sidewalks, streets, and easements.

2. Whether a permanent injunction based upon the content of the speech and not narrowly tailored to serve a compelling state interest may prohibit peaceful assembly, picketing, leafleting and other free speech activity on private property, which those engaging in such constitutionally protected speech either own or have permission to be upon, but which is not owned by Respondents.

3. Whether a permanent injunction may bind persons who have not engaged in any tortious activities, have not acted in concert with named defendants, have not received notice of the underlying litigation, and have had no opportunity to be heard to present individual unique defenses before they are enjoined.

4. Whether it is a violation of due process rights to preclude non-parties and absent defendant class members from challenging the constitutionality of an injunction against them or an invalid defendant class certification on the basis of preclusion doctrines such as *res judicata*, collateral estoppel, or the "law of the case," when the non-parties received no notice of the underlying litigation and were inadequately represented in it.

5. Whether an injunction that imposes restrictions on otherwise lawful expressive activity in public places conflicts with the doctrine of prior restraint.

LIST OF PARTIES

The parties to the proceedings are Petitioners Cheryl Sorrell, Marty DeLane, Joseph McQueen, Mark Berry, Ron Severt and Tammy Silvey.

The Respondents before this Court include The Dayton Women's Health Center, Inc., K.W. Davis, MD., and Robert Skipton, MD.

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Respondents.

Petition For A Writ Of Certiorari To
The Court Of Appeals For Montgomery County, Ohio

The Petitioners Cheryl Sorrell, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for Montgomery County entered in *Dayton Women's Health Center v. Enix* on August 21, 1990 affirming the decisions rendered by the Common Pleas Court for Montgomery County on March 14 and June 6, 1989. The Supreme Court of Ohio declined to hear the case on January 22, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals of Montgomery County, Ohio, Second Appellate District, styled *Dayton Women's Health Center v. Enix* of August 27, 1992, is unreported. It is reprinted in the Appendix, pp. 69 - 85.

The decision of the Common Pleas Court for Montgomery County, Ohio of March 14, 1989 which ordered a permanent injunction against the Petitioners and the defendant class is unreported. It is reprinted in the Appendix, pp. 55 - 56.

Other decisions rendered in this case include the decisions of the Common Pleas Court for Montgomery County, Ohio of (1) June 6, 1989 finding Petitioner Tammy Silvey in contempt of court, (2) July 10, 1987 ordering a permanent injunction against the the original named defendants and the defendant class, (3) March 16, 1987 modifying the order of January 15, 1987 and (4) January 15, 1987 certifying the defendant class and issuing a preliminary injunction against the original named defendants and the defendant class. All of which are unreported and are reprinted in the Appendix, on pages 67 - 68, 13 - 18, 8 - 12, 1 - 7 respectively.

The opinion of the Court of Appeals of Montgomery County, Ohio, Second Appellate District of December 5, 1988 affirming the lower court's decision is unreported. It is printed in the Appendix, p. 19 - 33.

The appeal to the the Supreme Court of Ohio of the interlocutory order, reported in 52 Ohio St. 3d 67, 555 N.E.2d 956 (1990) is reprinted in the Appendix, p. 35 - 52.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

The order of the Supreme Court of Ohio denying review of the Court of Appeals of Montgomery County, Ohio decision rendered on August 27, 1991 was issued on January 22, 1992. This petition has been filed within ninety days of the entry of the

order by the Ohio Supreme Court denying review of the lower court's decision.

CONSTITUTIONAL PROVISIONS INVOLVED

This case raises issues under the Free Speech Clause of the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In addition, this case raises issues under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution which provides:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from decisions rendered by the Common Pleas Court for Montgomery County, Ohio on March 14 and June 6, 1989 and affirmed by the Second Appellate District on August 27, 1991.

A. Procedural Posture

On October 14, 1986, Plaintiffs-Respondents ("Respondents")[1] filed a complaint requesting injunctive relief against the original named defendants[2] and a defendant class. On January 15, 1987, the trial court certified a defendant class defined as "all individuals protesting the activities conducted at The Dayton Women's Health Center ," and the original named defendants were ordered to represent the class. A permanent injunction was issued against the defendant class on July 10, 1987.

After the permanent injunction was issued, the original named defendants appealed the injunction and the class certification issues. On December 5, 1988, the Second Appellate District Court of Ohio modified the permanent injunction and determined that the appeal of the class certification issues had been forfeited by the failure of the named defendants to immediately appeal the order of January 15, 1987 certifying the class. *Dayton Women's Health Center v. Enix*, No. 10579 (Montgomery Co., December 5, 1988). Pursuant to Ohio Rev. Code Sec. 2501.12, an order certifying the case for review by the Supreme Court of Ohio was issued on the question of whether defendant class certifications are appealable orders which must be immediately appealed. The Supreme Court of Ohio affirmed the appellate court's decision on that issue without addressing

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1. Respondents are The Dayton Women's Health Center ("DWHC"), Dr. Davis and Dr. Skipton.

2. The original named defendants were David Enix, James Mehaffie, David Mehaffie, Douglass Sapp, Kym Mehaffie and H.F. Perkins.

the other constitutional questions raised. *Dayton Women's Health Center v. Enix*, 52 Ohio St. 3d 67, 555 N.E.2d 956 (1990).

On January 20, 1989, while the original appeal of this case was pending, Respondents filed citations of contempt against the six original named defendants, the Petitioners in this case, and six other alleged members of the defendant class.[3] A total of over 268 separate contempt citations were filed for conduct occurring over a period of a year and a half. The citations were tried from February 9 to February 15, 1989. On March 14, 1989, the trial court found that 10 of the 18 individuals were in contempt of court on 18 of the citations. The remaining 250 citations were dismissed. Although each individual found guilty of contempt was fined $500 for each citation, the fines were suspended.

In its March 14, 1989 judgment, the trial court also issued additional restrictions upon the class.[4] Subsequently, Petitioner

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3. Members of the defendant class who were not original parties to this litigation, but who were charged with contempt include Petitioners, Tammy Silvey, Cheryl Sorrell, Marty DeLane, Joseph McQueen, Mark Berry, and Ron Severt; and non-parties: Dawn Thomas, Mindy Berry, Bruce Moore, Mary Gigandet, Lori DeLane and Corina Sumner.

4. The new injunction prohibits the Petitioners and the defendant class from :
   1. Blocking or interfering with the access or egress of any individual going to or from . . . [DWHC];
   2. Blocking or interfering with the driveway of . . . [DWHC];
   3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;
   4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk their horns, including hand and arm signals;
   5. Speaking, chanting, yelling or *mechanically* communicating in any manner designed or intended to reach the staff or patients or volunteers inside . . . [DWHC]or patients or volunteers inside . . . [DWHC], or in such a volume that it is reasonably apparent that the communications are likely to be heard by the staff or patients or volunteers inside . . . [DWHC];
   6. Trespassing on the property of . . . [DWHC];
   7. *Picketing in any form, including parking, parading, or demonstrating which is limited to homes of patients, employees, staff, or volunteers of The Dayton Women's Health Center or the physicians performing services at the . . . [DWHC]*;

Tammy Silvey was accused of violating the March 14, 1989 injunction for conduct on April 25, 1989. On June 2, 1989 a hearing was held on this charge. On June 6, 1989, the trial court found Silvey in contempt and ordered her to pay a $500 fine plus the suspended fines imposed against her in the March 14, 1989 order.

Petitioners appealed the trial court's March 14 and June 6, 1989 judgments. Petitioner Silvey appealed her contempt convictions and the other Petitioners appealed the injunction issued against them. On August 27, 1991, the Second Appellate District Court affirmed the trial court's judgments.

The Appellate Court refused to address Petitioners' challenge to the propriety of the defendant class certification and injunction holding that the right to appeal those issues had been forfeited by the original class representatives' failure to file an immediate appeal of the class certification order. The Appellate Court also held that Petitioners could not challenge the constitutionality of the injunction against them insofar as similar issues had been previously determined by the Appellate Court. Consequently, the Appellate Court refused to address Petitioners' challenges to the constitutionality of the injunction.

Petitioners appealed this decision to the Supreme Court of Ohio. The Ohio Supreme Court refused to hear the case.

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8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at . . . [DWHC] in groups of more than five individuals;
9. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within the viewing distance of . . .[DWHC];
10. Picketing in any form including parking, parading or demonstrating within the viewing distance of . . . [DWHC] at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility, *more specifically, between the south side of the driveway just north of the clinic building and the north side of the driveway just south of the clinic building;*
11. Picketing in any form including parking, parading or demonstrating within the viewing distance of . . . [DWHC] in groups of more than ten (10) individuals.

(March 14, 1989 order [emphasis added]. The italicized portions in the above paragraphs of the injunction identify additions or modifications to the July 10, 1987 injunction.)

B. Statement of Facts

DWHC is an abortion clinic located in a commercial area in Dayton, Ohio. The other two Respondents are employed at DWHC and have a private office elsewhere. DWHC is housed in a three-story building that is approximately 70 feet from the public street and the sidewalk it faces. The building is owned by DWHC's director. DWHC occupies the top two floors.

Since the trial court's permanent injunction was issued on July 10, 1987, Petitioners on occasion have engaged in peaceful constitutionally protected picketing and leafleting within view of DWHC. They have engaged in such activity on their own and not in concert with any of the original named defendants or anyone else. Petitioners were not parties to the original litigation, received no notice of those proceedings, were not served with the complaint and were not given an opportunity to be heard in those proceedings or a chance to present any individual defenses they had to the cause of action alleged by Respondents. Petitioners were not charged in the complaint with committing any torts against Respondents and there is no evidence that they have ever threatened to commit or have committed such torts. The first time Petitioners were brought into this case was on September 19, 1988, when Respondents filed contempt charges against the Petitioners. Those charges were refiled on January 20, 1989. Thus, prior to September 19, 1988, the Petitioners had no involvement in the litigation that resulted in the original injunction issued in this case.

Four of the Petitioners, Cheryl Sorrell, Marty DeLane, Mark Berry and Ron Severt, were acquitted of all the contempt charges brought against them. There is no evidence and no finding by the trial court that those Petitioners were legally associated with the original named defendants in the case. Nevertheless, the trial court issued an injunction against those Petitioners enjoining them from engaging in activity that is either lawful (*e.g.*, presence on public and private property around DWHC for the purpose of engaging in constitutionally protected activity), or when unlawful (e.g., blocking access to or trespassing upon DWHC), not conduct in which they have engaged.

Petitioner Tammy Silvey was convicted of contempt for: (1) conduct on September 13, October 7, and December 6, 1988, and January 17, 1989, involving picketing behind the building DWHC is in; (2) conduct on December 9, 1988 involving a violation of the injunction's number restriction; and (3) conduct on January 13 and April 29, 1989, involving picketing at the southwest side of the building DWHC is in. The first set of contempt citations for which Silvey was found guilty involved picketing on private property not owned by Respondents. Petitioners had been given express permission from the manager of the building behind DWHC to be on this property. Silvey's contempt conviction for violating the injunction's numbers restriction on December 9, 1988, involved an event where more than 200 persons were present at DWHC, but the event was peaceful and orderly. Except for the numbers violation, no other violations of the injunction or any other illegal activity occurred. Police were present, but no arrests were made. No one was prevented from entering DWHC, and no one was charged with blocking or interfering with traffic or making loud noise. DWHC had a party that day and its director told the press that DWHC's operations were not disrupted. Silvey's contempt convictions for conduct on January 13, 1989, and April 29, 1989, also involved Silvey's presence on property not owned by Respondents. There is no evidence in the record that the actual owner of this property objected to Silvey's presence on it.

In each instance where Silvey was convicted of contempt, she was otherwise engaged in peaceful constitutionally protected activity involving no tortious or criminal conduct. One of DWHC's patients, the only such patient to testify in any of the proceedings involving this matter, said Silvey "showed [her] a lot of care," "just wanted to help" her, and prayed with her. It is this type of constitutionally protected activity that the Respondents have succeeded in prohibiting.

During the contempt trial, it was established that: (1) Respondents were not harmed by peaceful picketing on any public property within view of DWHC; (2) Respondents were given permission by the owner of private property contiguous with DWHC to be present on that property (four of Tammy Silvey's contempt convictions were for being present on that

property); and (3) Respondents did not own the private property surrounding DWHC (although employees of DWHC go on that property). DWHC's director also conceded that the owners of the private property surrounding DWHC should have the right to protest DWHC's activities on their own property.

REASONS FOR GRANTING THE WRIT

The Ohio court has created law which is diametrically opposed to the U.S. Constitution and the settled precedents of this Court. This case involves an unprecedented, overbroad, content-based injunction imposed upon the Petitioners and a defendant class which is unconstitutional in that it restricts class members' speech based on whether that speech protests abortion. This injunction strips absent class members of their due process rights by adjudicating their rights without notice and without any opportunity to be heard and restrains otherwise lawful expressive activity in a public fora and on private property not owned or controlled by Respondents. Moreover, the injunction is not supported by any compelling state interest. By allowing the injunction to stand, Ohio's court of last resort has undermined the mandates of this Court issued in numerous decisions. This case is also unprecedented in that it involves a denial of absent defendant class members due process right to challenge the binding effect and constitutionality of an injunction issued against them in which they received no notice, made no appearance and were inadequately represented. Such an affront to the Constitution deserves this Court's attention.

I.

The permanent injunction directly contravenes the First Amendment guarantees of free speech and free assembly in that it is a content-based restriction on political speech in a public forum and is not narrowly tailored to serve a compelling state interest

This Court has consistently held that "peaceful picketing [is] expressive activity involving speech protected by the First Amendment." *U.S. v. Grace*, 461 U.S. 171, 176 (1983) (internal quotation marks and citations omitted). Furthermore, public streets and sidewalks are especially protected public fora for the purposes of the First Amendment which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Boos v. Barry*, 484 U.S. 312, 318 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). This Court has said that any attempts to restrict such activity in these fora are "very limited." *Id.* Any restriction must be content-neutral. *U.S. v. Grace* 461 U.S. 171 (1983).

The injunction in the instant case restricts picketing, leafleting or any form of expression or free speech activity (the trial court defines "picketing" so broadly that it includes "parading, parking, or any other form of demonstration" and "even goes to mere presence of a person") protesting abortion on the public sidewalks, streets, or easements within view of the DWHC.

These injunctive restrictions are not content-neutral. By its terms, the injunction enjoins only speech by those "protesting the activities conducted at . . . DWHC," only speech protesting abortion is prohibited. These restrictions would not apply to labor protests, civil rights marches, demonstrations against acid rain, and so forth, because such demonstrations would not involve persons who are protesting DWHC's activities. The injunction singles out pro-life speech for censure. Strictures on speech in such fora that occupy a "special position in terms of First Amendment protection" is unwarranted. *Boos* at 318. This

Court has held in *Police Department v. Mosley*, 408 U.S. 92, 96 (1972):

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views its finds acceptable, but deny use to those wishing to express less favored or more controversial views .... Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

By excluding only those who speak *against* abortion, the Ohio Courts have "grant[ed] to one side of a debatable public question . . . a monopoly in expressing its views." *United States v. Kokinda,* 110 S.Ct. 3112, 3125 (1990) (plurality) (internal quotation marks and citation omitted). In upholding this injunction, the Ohio Courts have rendered decisions in conflict with the precedents of this Court.

For example, this Court struck down a statute in *Boos v. Barry*, 484 U.S. 312, 318 (1988), laden with analogous constitutional infirmities.

The statute at issue in *Boos* prohibited picketing in protest of the government represented by the embassy within 500 feet of any foreign embassy. This Court struck down the anti-picketing statute as a content-based restriction unsupported by any compelling state interest. The injunction here, like the invalid statute in *Boos*, prohibits core First Amendment expression -- classic political speech. Time and again this Court has declared that such prohibitions are constitutionally unsound:

> We have recognized that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be

> uninhibited, robust, and wide open," *New York Times v. Sullivan*, 376 U.S. 254, 270, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964). . . . This has led us to scrutinize carefully any restrictions on public issue picketing.

Id. at 318.

The statute in *Boos* forbade picketing expressing a certain viewpoint. As this Court noted,

> Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech, however, are permitted.

Id. at 318-19. Though the Respondents in *Boos* contended that the statute was content-neutral, this Court found otherwise.[5] This injunction far exceeds the restrictions struck down in *Boos*. The Ohio courts have gone beyond violating mere content-neutrality; they have extended their reach to exclude a disfavored viewpoint about abortion. See also *United States v. Grace*, 461 U.S. 171 (1983); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).[6]

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5. "Applying these principles to the case at hand leads readily to the conclusion that the display clause is content -based." *Boos* at 321.

6. In *Carey v. Brown*, 447 U.S. 455 (1980), and *Police Department v. Mosley*, 408 U.S. 92 (1972), this Court struck down laws that prohibited picketing in public places but exempted certain labor picketing. These laws unconstitutionally "discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Carey*, 447 U.S. at 460 (footnote omitted). A restriction based upon the speaker's point of view is even more patently unconstitutional. *See Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806, 812 (1985) (viewpoint discrimination is unconstitutional even in a non-public forum).

In the instant case the permanent injunction forbids:

1. Protesting or expressing a viewpoint critical of abortion anywhere within view of the DWHC except the public sidewalk in front of the clinic;

2. More than 10 persons from protesting or expressing a viewpoint contrary to abortion on that public sidewalk;

3. Only speech protesting abortion; and

4. Petitioners from being present on private property even with the owner's permission, if that property is within view of DWHC and if Petitioners express or hold a viewpoint critical of abortion.

The permanent injunction, however, permits individuals or groups to be present anywhere within view of DWHC to protest or discuss any other issues, or to picket in favor of abortion. Only the speech of those critical of abortion is prohibited or restricted.

Ruling on the statute in *Boos*, this Court cited *Perry Educators Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45 (1983), for the contention that content-based restrictions on speech in the public forum are valid only if they are necessary to serve a compelling state interest; further, they must be narrowly drawn to serve that interest. *Boos* at 321. See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 238 (1984); *Califano v. Yamasaki*, 442 U.S. 682 (1979)

Such overbroad restrictions are anything but narrowly tailored. A law is narrowly tailored only "if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Because the injunction prohibits Petitioners and class members from being present at any location within view of

DWHC other than a small portion of the public sidewalk directly in front of DWHC, Petitioners and class members cannot:

1. Be on the public street, South Dixie Drive because it is within view of DWHC;

2. Be on the public easement on the west side of South Dixie Drive opposite DWHC; or

3. Be on the public sidewalk on the east side of South Dixie Drive except between the two driveways on either side of the building DWHC is in.

The injunction is not narrowly tailored to deal only with the "source of the evil" shown by Respondents because DWHC is not harmed by protesters being on public property at locations farther away from DWHC than the area permitted by the injunction. DWHC's director admitted that DWHC was not harmed when Petitioners and class members were on portions of the public sidewalk now designated as "out-of bounds" by the injunction.

The trial court's ban on residential presence is also overbroad because it sweeps within its ambit legal and constitutionally protected activity. The trial court has not limited the injunction to the traditional notion of "picketing," but has said that it includes the mere presence of a person, and has used problematic language forbidding presence that is "limited" to homes of DWHC patients and staff. The trial court chose not to mention the more specific language in *Frisby* about a residential ban being constitutional only if it prohibits traditional picketing activity taking place solely in front of a particular residence. 487 U.S. at 483. Because the trial court has not narrowed its ban to traditional picketing activity and because it appears that only general marching through an entire neighborhood is permitted, the injunction is overbroad. The ban on residential presence is also overbroad because it does not permit DWHC staff or

patients to give Petitioners or class members permission to be present at staff or patients' homes. *Id.* at 488.[7]

The only rights involved in this case are those of private parties - the DWHC, their staff or their patients. The Supreme Court of Ohio, without any compelling state interest at stake, failed to reverse an overbroad and vague injunction restricting the free speech of all persons who protest abortion in the public forum.

II.

The injunction violates the free speech and property rights of class members by enjoining them from engaging in constitutionally protected activity on private property

An injunction is overbroad when it restricts one from using private property that the owner has given the person enjoined express permission to use. *Gregory v. Sanders*, 635 P.2d 795, 802 (Wy.1981). *Cf. Frisby*, 487 U. S. 474, 488 (1988) (where this Court indicated that an ordinance restricting residential picketing may avoid an overbreadth problem when the picketer is at the home by invitation of a resident). The place restrictions of the injunction prohibit Petitioners and class members from being present on or visiting any residence or commercial establishment within view of DWHC for any purpose, even for constitutionally protected activity or legitimate business purposes, even if they are invited or own the property in question. Such restrictions are overbroad, particularly when Petitioners have been given permission to be on private property within view of DWHC.

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7. In his dissenting opinion, Justice Stevens said the law in *Frisby* on its face prohibited picketing even in front of the homes of willing recipients, which prohibition he said was unquestionably overbroad. 487 U.S. at 497, 499.

III.

The injunction violates the Due Process rights of absent class members by adjudicating their rights to free speech without notice of the underlying litigation or opportunity to be heard to present individual unique defenses before they are enjoined

One of the leading commentators on class actions, Herbert B. Newberg, has explained that, "due process requires that a fair opportunity to present unique defenses, by separate trials or otherwise, *must be afforded within the class action context before any defendant class member will be bound by any class judgment.*" 1 H. Newberg, Newberg on Class Actions Sec. 4.61 (2d ed. 1985) (emphasis added).

This Court has not addressed the issue of what constitutes notice for defendant class actions. This Court has provided some important guidance in its decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *Mullane* involved an action brought by a bank requesting review of its management of a trust fund in which thousands of individuals had an interest. The judgment foreclosed future claims of mismanagement. Pursuant to a New York statute, notice to defendants was provided by publication and a guardian was appointed to represent interests of defendants who did not appear. *Mullane* held that notice by publication, along with the appointment of a guardian to represent interests of non-appearing defendants, was insufficient to protect their due process rights without the best practical notice to each defendant. On its facts, *Mullane* could have been certified as a defendant class action. Petitioners submit that the holding of *Mullane* should be extended so that all defendant class members are notified of the underlying litigation and given an opportunity to be heard before they are bound by a court's decree.

That absent class members of a defendant class must be given notice of the action and an opportunity to present individual defenses *before they may be bound by a judgment involving the class* has been uniformly recognized. *E.g., Henson v. East Lincoln Township*, 814 F. 2d 410, 415 (7th Cir. 1987) *cert.*

granted, 56 U.S.L.W. 3320 (U.S. Nov. 2, 1987) (No. 87-5461) ("it would be odd if the rule permitted a defendant class without requiring notice"); *Kerney v. Ft. Griffin Fandangle Association, Inc.*, 624 F.2d 717, 721 (5th Cir. 1980) (members of a defendant class must "be given adequate notice of the action and an opportunity to present individual defenses"); *In re Gap Stores Security Litigation*, 79 F.R.D. 283, 291-92 (N.D. Cal. 1978) ("due process requires notice to each [defendant] class member"). *Cf. Phillips Petroleum v. Shutts*, 472 U. S. 797 (1985) (this Court has held that all absent plaintiff class members must be notified of the proceedings).

No attempt was made to provide absent class members with notice of the litigation or class certification hearing so that they could object or present individual defenses before a judgment was issued against them. In this case, potential class members were not given notice "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Instead, defendant class members are only required to be given a copy of the injunction at which time they are bound and their liberty is immediately curtailed.

The due process violations are even more egregious because the injunction restricts and threatens with contempt innocent non-parties whose only defining characteristic is that they have engaged in free speech activity protesting abortion. In *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 924 n.67 (1982), this Court specifically recognized that such innocent persons cannot be so enjoined. In sharp disregard of this clear precedent, the Ohio courts have assumed that parties who have committed no tortious acts and have no connection with the original named defendants may be bound by the injunction and held in civil contempt for allegedly violating it. That the persons so enjoined engaged in nothing more than constitutionally protected activities appears to be no defense.[8] The Ohio state

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8. When the underlying injunction is reversed, so must the citations for civil contempt. E.g., *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947); ("[t]he right to remedial relief [for civil contempt] fails with an injunction which events prove was erroneously issued"); *Matter of Campbell*, 761 F.2d 1181, 1185

courts have assumed that anyone's free speech may be enjoined if they are merely present and are perceived by DWHC staff members as sharing the viewpoints of the Petitioners regarding abortion.

The injunction also violates Petitioners' due process rights when it presumes "to make punishable the conduct of persons who act independently [from the parties] and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, (1945). Judge Learned Hand explained in *Alemite Manufacturing v. Staff*, 42 F.2d 832, 832-22 (2d Cir. 1930), why an injunction cannot bind non-parties who act independently: A court "is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it has personal service, and who therefore have their day in court." *Alemite* was followed by this Court in *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1934), which held it to be error to extend an injunction to "all persons to whom notice of the injunction should come." This Court observed:

> [B]y extending the injunction to "all persons to whom notice of the injunction should come," the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law .... To subject them to such peril violates established principles of equity jurisdiction and procedure.

Id.

The injunction violates that standard because it purports to bind anyone served with it who protests DWHC's activity even

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(6th Cir. 1985); *ITT Community Development Corporation v. Barton*, 569 F.2d 1351, 1356 (5th Cir. 1978). Because the trial court's injunction is unconstitutional and invalid with regard to Petitioner Tammy Silvey as set forth in this brief, the findings of civil contempt and all fines and awards of attorneys fees against Tammy Silvey must be reversed.

though they (1) are non-parties, (2) received no notice of the lawsuit, (3) did not have their day in court in a proceeding adjudicating their personal rights, and (4) act independently of the parties. The injunction, therefore, deprives such people of their liberty without affording due process of law.

IV

It is a violation of due process rights to preclude non-parties and absent class members from challenging the constitutionality of an injunction against them or an invalid defendant class certification on the basis of preclusion doctrines such as *res judicata*, collateral estoppel, or the "law of the case," and when the non-parties received no notice of the underlying litigation and were inadequately represented in it.

The Appellate Court refused to address the constitutionality of certain terms of the trial court's March 14, 1989 injunction or to review the propriety of the defendant class certification based on the "law of the case" doctrine set forth by the Supreme Court of Ohio in *Nolan v. Nolan*, 11 Ohio St. 3d 1, 462 N.E.2d 410 (1984). Applying the law of the case doctrine, or any preclusion doctrine, to the rights of the non-party Petitioners is inappropriate. Persons who were not parties to the original injunction lawsuit and class action hearings and who were not provided notice of the suit or of an opportunity to be heard cannot be precluded by doctrines of *res judicata* and collateral estoppel from challenging the validity of the class certification order and permanent injunction issued against them and the class. *Res judicata* and collateral estoppel apply only to parties and those legally identified with them. The Petitioners first appeared in this case in September 1988 when they were cited with contempt. There is no evidence that the Petitioners were class members on July 10, 1987 or at any time earlier or were ever given notice of the proceedings. There is no evidence that

the Petitioners are legally identified with the parties in this suit. Therefore, this Court's holding in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1970) is applicable:

> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position.

The Court cited *Hansberry v. Lee*, 311 U.S. 32 (1940), a class action case, for that proposition.

Thus, litigants, like the non-party Petitioners, who have never appeared or received notice of the prior action, who were not parties, who never had a chance to present their own evidence and arguments, and whose chosen representatives failed to file a timely appeal, thereby precluding full litigation or the arguments now on appeal, cannot be collaterally estopped.

Finally, the rules of *res judicata* and collateral estoppel as they apply to class action judgments establish that absent class members are only bound by a class judgment when at least three conditions are fulfilled: (1) the class was properly certified, (2) the interests of the absent class members were adequately protected throughout the class action proceedings, and (3) absent defendant class members were notified of the proceedings and afforded within the class action context an opportunity to present their own defenses. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 812 (1985); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Keene v. United States*, 81 F.R.D. 653 (S.D.W. Va. 1979); *Lewis v. Phillip Morris, Inc.*, 419 F. Supp. 354 (E.D. Pa. 1976).

In *Shutts*, *supra*, this Court set forth the minimum due process requirements for binding absent class members to a class action judgment:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314-15; *Cf. Isen v. Carlisle & Jacquelin*, 417 U.S. 15, 174-75 (1974). The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interest of the absent class members.

Id. at 812. While the Court indicates that its decision is not necessarily dispositive of the due process concerns arising in a defendant class action (*Id.* at sec. 11 n.3), it is clear from *Shutts* that the due process concerns of a defendant class *are greater* than in a plaintiff class action. This Court stated: "Because states place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." *Id.* at 811. Commentators have recognized that implicit in the *Shutts* decision is the "idea that a more stringent test will be applied in determining the enforceability of an adverse judgment against absent defendant class members." 2 *Class Actions: Law and Practice sec. 23:05 (1987).*

The requirements of *Shutts* have not been satisfied in this action. Thus, the Petitioners, who never appeared in or received notice of the action, who never had a chance to present their own evidence and arguments, and whose chosen representatives failed to file a timely appeal, thereby precluding full litigation of the arguments now on appeal, cannot be collaterally estopped. *See Gonzales v. Cassidy* 476 F.2d 67, 76 (5th Cir. 1973) (a class

representative cannot be said to have "vigorously and tenaciously protected the interest of the class he was purporting to represent, or that all members of the class had been afforded due process of law by having a full day in court" when the class representative fails to prosecute a non-frivolous appeal on behalf of the class).

V

An injunction that imposes restrictions on otherwise lawful expressive activity in public places conflicts with the doctrine of prior restraint.

The Ohio courts upheld the speech-restrictive portions of the injunction at issue as reasonable time, place, and manner regulations. In so doing, the court pursued a course in clear conflict with the decisions of this Court applying the doctrine of prior restraint.

This Court has never approved of the use of injunctions as a vehicle for substantive legislation, *i.e.*, for defining new offenses. On the contrary, this Court has treated injunctions which impose substantive restrictions on free speech as presumptively unconstitutional prior restraints.[9] Nor has this Court ever applied time, place and manner analysis to injunctions that impose substantive restrictions on expressive activity. Rather, the Court has applied this test only to statutes, ordinances, and regulations.[10]

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9. *E.g., National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977) (per curiam)(injunction against marches and rallies); *New York Times Co. v. United States,* 403 U.S. 713 (1971) (per curiam) (injunction against publication of classified government documents); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne,* 393 U.S. 175 (1968) (court order restraining public rallies and meetings).

There are several reasons, reflected in the decisions of this Court, for disfavoring the use of substantive injunctions against free speech. These considerations principally reflect the wisdom of preserving the distinction between the lawmaking role of elected bodies and the adjudicative role of courts.

First, a statute or ordinance applies uniformly, while an injunction typically imposes special legal restrictions only upon a particular group of people. The injunctive creation of substantive offenses therefore inherently results in unequal legal treatment.[11] In the present instance, for example, protesters against CIA activities or the sale of non-union grapes are free to assemble as many participants as they can and anywhere they want (subject, of course, to general laws ensuring public order and unobstructed passage). Anti-abortion protesters, however, must limit their rallies, marches, and pickets to only ten participants and to only certain locations. Animal rights activists may carry signs that say "Honk if you love puppies," but pro-life picketers are forbidden to carry signs that say "Honk if you love babies." Such content-based restrictions on expressive activities in public places constitute "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980) (citation and quotation marks omitted).

Second, those alleged to have violated an ordinance retain the full panoply of due process rights and substantive defenses. Those alleged to have violated an injunction, by contrast, face summary contempt proceedings with virtually no opportunity to challenge the underlying restrictions or raise any defense other than denial of the alleged acts. *E.g., Walker v. Birmingham*, 388 U.S. 307 (1967). Legislation by injunction, therefore, is akin to the imposition of martial law. Such a means

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10. *E.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972) (statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ordinance); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (regulations).

11. If the enjoined acts are already unlawful, the injunction does not define a new offense, but merely adds extra penalties. In such a case the order is remedial or procedural, not legislative or substantive.

of governance is repugnant to our system of republican form of government.

Third, the task of a court is to *weigh* a law, not to *draft* one. When a judge issues a substantive injunction, he effectively removes one level of judicial review. Just as a former legislator appointed to the bench ought not to hear a case challenging a law he himself authored, so a judge ought not to be in the position of judging an injunction he himself crafted. Courts refuse to rewrite unconstitutional laws; nor should a court write the law in the first place in the form of a substantive injunction. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) ("We do not believe . . . that . . . the time, place, or manner decisions assign to the judiciary the authority to replace [government officials] as the manager of [public forum property - here, parks]"); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("It is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here by police and protestors").

Fourth, judicial creation of new substantive laws, by means of an injunction, bypasses and denigrates the legislative function of elected, representative bodies. City councils and state legislatures have the task of enacting laws defining offenses and regulating conduct. If a city council declines to enact a "bubble zone" requirement or a ten-person limit on marches or protests, a court should not preempt this representative decision by passing the same restriction in injunctive form. Such misuse of the judiciary overburdens the courts and encourages elected officials to evade responsibility by referring citizen complaints to the courts. *Cf. New York Times Co., v. United States* 403 U.S. 713 (1942) (Marshall, J., concurring)(constitution does not provide for "government by injunction" in which courts may "make law"); *Id.* at 731; (White, J., concurring) (prior restraint not justified, "at least in the absence of express and appropriately limited [legislative] authorization").

The doctrine of prior restraint establishes a constitutional barrier to such abuse of the judiciary and resultant jeopardy to free speech rights. By evaluating the injunction at issue under the time, place, and manner standard applicable to

legislation, the court below ignored the strict constitutional safeguards designed to shield free speech from unconstitutional prior restraints.

This Court "has emphasized that a system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968) (internal quotation marks, brackets, and citations omitted). *See also FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990).

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84. In past decisions, this Court has consistently regarded an injunction that restricts expressive activity in public places as a prior restraint. *See supra* n. 10 (citing cases). The Ohio Court ignored these precedents in the case at bar.

CONCLUSION

If allowed to stand, the injunction in this case holds hostage federal constitutional rights, inhibiting the open and robust exchange of ideas. This cannot continue. State courts cannot ignore free speech rights in disregard of clear precedents.

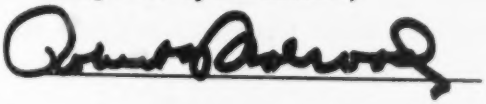
This case is unprecedented because the Ohio courts through a content-based injunction, which prohibits speech protesting abortion, have impermissibly (1) enjoined citizens from exercising their constitutionally protected rights, (2) bound absent class members who were not given notice of the

underlying litigation or an opportunity to present their unique defenses in that suit in violation of the requirements of due process, (3) denied the Petitioners the opportunity to challenge many aspects of the constitutionality of the injunction or the propriety of the class certification even in the light of inadequate representation by the court-designated class representatives.

The primary purpose of the injunction in question is to specifically prohibit the otherwise lawful expressive activity in public places in violation of the doctrine of prior restraint. The injunction also impermissibly restrains lawful activity on private property. It is an affront to our Constitution.

If the First Amendment is to have any force at all, it must protect free speech rights from being circumvented solely because the one seeking to exercise them does so within sight of those who disagree with the ideas expressed. That is precisely what this injunction seeks to do. It excludes from the public forum one voice and one voice only: that of the person protesting abortion. For these and the reasons previously cited, Petitioners pray that the writ of certiorari be granted.

Respectfully submitted,



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(2)

No. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1991

Cheryl Sorrell, Marty DeLane, Joseph McQueen, Mark Berry, Ron Severt and Tammy Silvey,

Petitioners,

v.

The Dayton Women's Health Center, Inc., K. W. Davis, Md., and Robert Skipton, Md.,

Respondents.

APPENDIX

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Filed Jan. 15, 1987, at 1:56 p.m.

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, et al.,	: CASE NO. 86-3120
Plaintiffs,	: (Judge John M. Meagher)
v.	: DECISION, ENTRY & ORDER OVERRULING DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' CLASS ACTION;
DAVID ENIX et al.,	: CERTIFYING CASE AS CLASS ACTION; AND
Defendants.	: SUSTAINING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

: : : : : : : : : : : : : : : :

This matter comes before the court on defendants' motion to strike plaintiffs' class action and plaintiffs' motion for preliminary injunction.

The facts indicate that the plaintiffs brought this action in October 1986 claiming that defendants have interfered with plaintiffs' business, staff and patients by engaging in a variety of activities including invasion of privacy, trespass and interference with business relationships. Plaintiffs pray for injunctive relief and monetary damages.

Defendants move to strike plaintiffs' class action claiming that the requirements of Ohio Civil Rule 23 have not been satisfied. An examination of Rule 23(A) lists the four prerequisites necessary for a class action lawsuit.

One or more members of a class may sue or be sued as representative parties on behalf of all only if:
(1) the class is so numerous that joinder of all members is impracticable.

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(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interests of the class.
In addition, one of the requirements enumerated in Rule 23(B) must be met:

An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(a) inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct to the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or

corresponding declaratory relief with respect to the class as a whole...

The Court finds from the evidence that the first

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requirement of Rule 23(A) is clearly satisfied inasmuch as on at least two separate occasions, up to seventy-five (75) persons have engaged in picketing activities at the Dayton Women's Health Center. Thus, the class is so numerous that joinder of all members is impractical. Lastly, the Court finds no merit in the contention that the granting of an injunction against defendant class would be an injunction against the entire world.

The second requirement, that is, that questions of law or fact be common to the class is also clearly satisfied, in light of the many instances involving representatives of the class in acts of trespass, obstruction and interference with the orderly flow of traffic on South Dixie Drive and verbal abuse.

The third and fourth prerequisites of Rule 23(A) are also met. The Court finds no conflict of interest between the representatives of the class and the defendant class itself. Furthermore, the Court finds that the representatives of the class have already, and will continue to, adequately represent the interests of the class.

Finally, it is apparent to the court that the requirement of Rule 23(B)(1) has been satisfied and thus warrants certification of plaintiffs' proposed class. If this matter was allowed to proceed without class certification, separate adjudication could possibly result in prejudice to non-party litigants. In short, all the requirements necessary to maintain a class action have been satisfied.

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Therefore, in the interest of judicial efficiency and in accordance with the forgoing, defendants' motion to strike plaintiffs' class action is OVERRULED.

Therefore, the Court, pursuant to Rule 23, certifies this matter as a defendant class action whose class consists of:

> all individuals protesting the activities conducted at the Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio 45439, who

have been personally served with this Entry and Preliminary Injunction as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Preliminary Injunction.

Plaintiffs' motion for preliminary injunction and defendants' opposition to it asks this Court to balance the defendants' constitutional right to free speech and assembly versus plaintiffs' constitutional right to privacy.

Plaintiffs operate the Dayton Women's Health Center which provides various health services including, but not limited to, therapeutic abortions. Defendant class objects to these services and has conducted various activities at the Center and the offices of the Center's physicians.

The Court, after carefully listening to all the testimony during three days of hearings, has determined that the defendants' conduct includes:

1) interference with the daily business operations of the Health Center including trespass upon the Health Center's
[No. 86-3120, 5]
property,

2) obstruction of the driveway which enters the Health Center's lot, and

3) interference with the flow of traffic on South Dixie Drive.

Therefore, the Court concludes that a preliminary injunction is the appropriate remedy in this matter.

The Supreme Court of the United States has determined that although freedom of speech is highly protected, it is not absolute. In fact, reasonable time, place and manner restrictions may be enforced providing that such restrictions are narrowly tailored to serve s significant governmental interest, leave open ample alternative channels of communication and are content neutral *United States v. Grace*, 461 U.S. 171 (1983). Therefore, in light of the evidence and balancing the constitutionally protected interests of both parties, the Court ORDERS that the defendant class and the representative defendants, David Enix, Jim

Mehaffie, David Mehaffie, Kim Mehaffie, Douglas Sapp and H.F. Perkins are enjoined from:

1) Blocking or interfering with the access or egress of any individual going to or from the Dayton Women's Health Center.

2) Blocking or interfering with the driveway of the Dayton Women's Health Center.

3) Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching

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the staff or patients inside the Dayton Women's Health Center.

4) Trespassing on the property of the Dayton Women's Health Center.

5) Verbal communications, either in person or by telephone, with employees of the Center unless such communications are with the consent of such employees.

6) Picketing at or within viewing distance of the homes of such employees in groups of more than three (3) individuals.

7) Picketing at or within viewing distance of the offices of such employees in groups of more than five (5) individuals.

8) Picketing at or within viewing distance of the Dayton Women's Health Center in groups of more than ten (10) individuals.

The court carefully reviewed the videotapes marked as plaintiffs' exhibits 14 and 15 and reaches the conclusion that serious issues of public safety exist that involve the members of defendant class and drivers and passengers of vehicles on South Dixie Drive. Two examples which illustrate the problem include the use of large red sign with the letters S-T-O-P and the use of signs urging motorists to honk. Both types of signs could easily confuse a driver or contribute to driver distraction and subsequently result in a collision with other vehicles or the picketers themselves. Accordingly, the Court feels compelled to further enjoin the defendant class and their representatives from

[No. 86-3120, 7]

9) Blocking or interfering with the flow of traffic on, from or to South Dixie Drive.

10) Picketing on the west side of South Dixie Drive.

11) Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs.

12) Using any sign urging motorists to honk.

In accordance with the foregoing, plaintiffs' motion for preliminary injunction is SUSTAINED.

Plaintiffs shall post a copy of this Order in front of the clinic at 3460 South Dixie Drive, Dayton, Ohio 45439. This notice is only an accommodation. Official class notice is by personal service on class members.

No further service of this Order shall be necessary on the representative defendants. For the purpose of this Order, "persons picketing" and a "picket" include persons present in the area referred to in this Order who are carrying protest and informational signs, passing out literature, speaking publicly, or otherwise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion. Service of this Order on such people shall be effected by the Sheriff of Montgomery County. Service documented by videotape will be preferred. Other evidence of service will be acceptable at the option of the Court. Those serving members of the class with this Order shall request the name and address of

of (*sic*) the person served. A person refusing to accept the Order shall be deemed to be served.

The Sheriff of Montgomery County may enforce the terms of this Order.

SO ORDERED:

/s/ John M. Meagher
John M. Meagher, Judge

Copies of this Decision, Entry & Order were served on all parties, as is indicated below, by ordinary mail this filing date:

DAVID GREER/JOHN HAVILAND, Attorneys for Plaintiffs

DAVID HAFFEY, Attorney for Defendants, D. Enix, D. & K. Mehaffie, D. Sapp and H.F. Perkins

JAMES CONDIT, Attorney for Defendant, Jim Mehaffie

CATHY MILLER, Bailiff

MONTGOMERY COUNTY SHERIFF'S DEPARTMENT

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, et al., Plaintiffs	:	CASE NO 86-3120 (Judge John M. Meagher)
-v-	:	DECISION, ENTRY & ORDER: SUPPLEMENTING AND MODIFYING COURT'S DECISION, ENTRY & ORDER OF JANUARY 15, 1987.
DAVID ENIX, et al., Defendants	:	

: : : :

3. Parking or picketing on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center.
4. Picketing at or within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of South Dixie Drive in front of the facility.

The Court will first address plaintiffs' third and fourth proposals in tandem. The January 15th Order enjoined the defendants from engaging in certain activities, including locking or interfering with the driveway of The Dayton Women's Health Center, trespassing on the property of The Dayton Women's Health Center, blocking or interfering with the flow of traffic on, From or to South Dixie Drive, and picketing on the west side of South Dixie Drive. The testimony of several witnesses at the hearing indicates that the defendants were engaged in among other activities, picketing on the west side of South Dixie Drive including parking on the west side of South Dixie. The testimony also indicates continued movement of defendants back and forth across South Dixie Drive resulting in traffic safety problems

In light of the previous Order and in the interest of the health and safety of the defendants and persons utilizing South Dixie Drive, the court finds that plaintiffs' third and fourth proposals are well taken.

Picketing, as defined in the January 15th Order, includes "persons present in the are referred to in [the] order who are carrying protest and informational isgns, passing out literature, speaking publicly, or otherwise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion." Page 7. Thus, "Picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere presence of an individual. Therefore, to clear up any misunderstanding of the parties and to reaffirm the intent of the original order, the defendants and defendant class are further enjoined from:

1. Picketing in any form including parking, parading, or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center, and
2. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk

bordering the east side of South Dixie Drive in front of the facility in groups of more than ten (10) individuals.

Defendants argue that there is a distinction between picketing and the mere presence of an individual. Although to some extent these activities are dissimilar, for the purpose of this injunction, they are considered to be, along with any other form of demonstration, the same prohibited activity except as otherwise provided by the order.

The First Amendment does no guarantee the right to communicate one's views at all times and places or in any manner that may be desired. *Heffron v. International Soc'y. for Krishna Consciousness*, 452 U.S. 640, 647 (1981). Considering other ample alternative channels of communication, the court finds the plaintiffs' third and fourth proposals do not impede upon defendants' First Amendment rights of free speech.

Plaintiffs' second proposal requests the prohibition of the use of any signs or communications that make any personal reference to any such patients, employees, or physicians. Although the Court finds some merit to plaintiffs, proposal, such a proscription would not be content neutral. Rules which restrain speech on the basis of its content presumptively violate the First Amendment. *Renton v. Playtime Theatres*, 106 S.Ct. 925, 928 (1986). Such content-based proscriptions "will be upheld only if narrowly drawn to accomplish a *compelling* governmental interest. *United States v. Grace*, 461 U.S. 171, 177 (1983). In the absence of any compelling governmental interest, the Court finds that plaintiffs' second proposal is without merit.

Plaintiffs also request an order proscribing picketing at or within the viewing distance of the residence of the patients, employees, and physicians of The Dayton Women's Health Center.

The testimony of Anita Wilson and Diane Hoellerman indicates that residential picketing has occurred on several occasions. The testimony reveals that such picketing included harassing the residents, trespassing on the property of certain residents, picketing in the street, and picketing at night as late as 11:15 p.m. The picketing also occurred on the cul-de-sac outside of Anita Wilson's home and at night at the residence of a doctor in Oakwood. Diane Hoellerman indicated that the picketing at her residence caused tempers to flare and caused the traffic to slow and stop outside her home. In short, the testimony shows that the residential picketing is, to a great extent, interfering with the peace and sanctity of the home, and to a lesser extent,

accomplishing the goal of picketing, communicating one's ideas and concerns.

The problem before the Court is balancing the right of citizens to enjoy the quiet, comfort and privacy of their homes against the right of the defendants to express their beliefs. The picketers clearly have a right to express their concerns but they must also honor the rights of others, especially those outside the controversy and within the tranquility of their homes. "It is well understood that the right of free speech is not absolute at all timesandunder all circumstances." *Chaplinsky v. New Hampshire*, 315 .S. 568, 571 (1942). In fact, the United States Supreme Court has "regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Adderly v. Florida*, 385 U.S. 39, 47-48 (1966).

Although courts have given great protection to public streets and sidewalks in regards to the dissemination of ideas, the court is compelled to make a distinction between residential picketing and business picketing. The nature of the forum and the conflicting interest involved have remained important in determining the degree of protection given to speech that is protected under the First Amendment. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

The rights of a person to enjoy the privacy of his home is disputed. *Poe v. Ullman*, 367 U.S. 497, 551 (1961); *Griswold v. Connecticut*, 381 U.S. 479 (1965). As Justice Black explained, "No mandate in our Constitution leaves states and governmental units powerless to pass laws to protect the public from the kind of boisterous, threatening conduct that disrupts the tranquility of spots selected by the people . . . for homes, wherein they can escape the hurly-burly of the outside business and political world. . ."*Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (Justice Black concurring).

Therefore, in accordance with the foregoing, the defendants and the defendant class are further enjoined from: Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients of The Dayton Women's Health Center, employees of The Dayton Women's Health Center and physicians performing services at The Dayton Women's Health Center.

Plaintiffs also move for an order for David Mehaffie to show cause why he should not be held in contempt of Court and for attorney fees.

Adequate testimony was presented on which the Court could find that David Mehaffie and other defendants were in contempt of the January 15th Order. However, other testimony indicates that the defendants were attempting to comply with the Order, but were unclear as to some of its limitations. The court will resolve this doubt in favor of the defendants. Yet, if brought back before the Court and if shown to be held in contempt, the defendants shall pay the plaintiffs' attorney fees incurred in connection with this proceedingandsuch future proceeding.

SO ORDERED:

\s\
John M. Meagher, Judge

Copies of this Decision, Entry & Order served on all parties, indicated below, by ordinary mail this filing date:

DAVID GREER/JOHN HAVILAND, Attorneys for Plaintiffs

DAVID HAFFEY, Attorney for Defts., David Enix, David & Kim Mehaffie, Douglas Sapp, and H. Fred Perkins

JAMES CONDIT, Attorney for Defendant, Jim Mehaffie

MONTGOMERY COUNTY SHERIFF DEPARTMENT

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, et al.,	: CASE NO. 86-3120
Plaintiffs,	: (Judge John M. Meagher)
v.	: DECISION, ENTRY & ORDER OVERRULING DEFENDANTS' MOTIONS TO AMEND PENDANT INJUNCTION OVERRULING PLAINTIFFS'MOTION TO
DAVID ENIX et al.,	: MODIFY THE PRELIMINARY INJUNCTION; ORDERING DEFENDANTS AND
Defendants	: DEFENDANT CLASS PERMANENTLY ENJOINED; AND ORDERING MEMBERS MAY BE ADDED TO DEFENDANT CLASS.

: : : : : : : : : : : : : : :

This matter comes before the Court on defendants Jim Mehaffie and David Mehaffie's motions to amend pendant injunction, plaintiffs' motion to modify preliminary injunction, and the parties' request for a permanent injunction on the evidence submitted.

Defendants moves [*sic*] this Court to amend the injunction by incorporating the following:

1. Eliminating the O.R.C.P. 23 "class certification.

2. Eliminate the language "within viewing distance of" as a limitation on the picketing activities at any site.

3. Increase the number of picketers authorized to 20 on each side of South Dixie Drive in front of the Plaintiff Center and increase the number of picketers to 20 at other sites covered by the order.

4. Eliminate all other aspects as to personal conduct except the terms "blocking" or "interfering" in the ingress and egress of any individual going to or from the Plaintiff Center including the driveways of the Center; and, trespassing.

[No. 86-3120, 2]

5. Redefine "picketing" to include only persons who are present in the area and carrying protest and informational signs.

Defendants contend that the current injunction exceeds the Court's jurisdiction and powers and therefore believe that these changes are warranted.

Plaintiffs oppose defendants' motions to amend the injunction. Plaintiffs correctly point out that defendants' memorandum of law in support of defendants' motions contains no discussion but simply lists six cases from foreign jurisdictions of which the first five discuss generally the requirements for certifying a plaintiff's class action. Notwithstanding the cases cited which discuss certifying class actions, the defendants have cited no legal authority relevant to the issues raised in their motions. Moreover, the defendants have not presented any new evidence or reasons to support the suggested amendments.

In light of the foregoing, defendants' motions to amend pendant injunction are OVERRULED.

Plaintiffs move for an order modifying the preliminary injunction by adding the following:

"it is further Ordered that the Sheriff of Montgomery County, Ohio, or any other law enforcement officer be and he hereby is authorized to arrest for contempt any defendant or member of the defendant class observed violating the terms of the injunctions issued by this Court."

Plaintiffs make this request as an alternative to the cumbersome

[No. 86-3120, 3]
procedure of motions to show cause.

After careful consideration, the Court is satisfied that the current procedure involving motions to show cause, although cumbersome, is the appropriate manner to bring a potential contemner to the Court's attention.

Accordingly, plaintiffs' motion to modify the preliminary injunction is OVERRULED.

Counsel for the parties having submitted this matter to the Court on the evidence presented at the various hearings thus far held, it is ORDERED that the individual defendants and the defendant class previously certified by the Court and consisting of all individuals protesting the activities conducted at The Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio, who have been personally served with this Entry and Order of Final Judgment or with this Court's Entry and Preliminary Injunction of January 15, 1987, as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Order of Final Judgment or this Court's Entry and Preliminary Injunction of January 25, 1987, be and they hereby are permanently enjoined from:

1. Blocking or interfering with the access or egress of any individual going to or from The Dayton Women's Health Center;

2. Blocking or interfering with the driveway of The Dayton Women's Health Center;

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3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;

4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk;

5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;

6. Trespassing on the property of The Dayton Women's Health Center;

7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;

8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;

9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;

10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center;

11. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

For purposes of this injunction, the term "picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere

[No. 86-3120, 5]

presence of an individual.

It is further ORDERED that members may be added to the defendant class by effecting service of a copy of this Order on individuals falling within the description of the defendant class by the Sheriff of Montgomery County, any other law enforcement individual or by any employee of The Dayton Women's Health Center.

The individual effecting such service shall thereafter file in this action a signed Certificate of Service stating the date, time and place of service together with the name and address of the individual upon whom such service was made.

All individuals who are members of the defendant class shall divulge to the individual effecting such service the name and address of any individual upon whom such service is effected, to the extent such information is known. If the name and address of the individual upon whom such service is effected is not known at the time of service, a photograph of the individual may be attached to the Certificate of Service in lieu of such information. Any employee of The Dayton Women's Health Center is hereby authorized to photograph the effecting of any such service.

Counsel should take note that this Decision, Entry and Order is also in the form of a judgment entry. Therefore, the time for prosecuting an appeal to the Second District Court of Appeals must be computed from the date upon which this decision and entry is filed.

[No. 86-3120, 6]

Costs are to be paid by the defendants.

SO ORDERED:

/s/ John M. Meagher
John M. Meagher, Judge

Copies of this Decision, Entry & Order served on all parties, indicated below, by ordinary mail this filing date:

DAVID C. GREER, Attorney for Plaintiffs

DAVID A. HAFFEY, Attorney for Defendants, D. Enix, D. & K. Mehaffie, D. Sapp, and H.F. Perkins

JAMES J. CONDIT, Attorney for Defendant, James Mehaffie and for Defendant Class

MONTGOMERY COUNTY SHERIFF DEPARTMENT

CATHY MILLER, Bailiff

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, ET AL	:	
Plaintiffs-Appellees	:	
vs.	:	CASE NO. 10579
DAVID ENIX, ET AL	:	
Defendants-Appellants	:	

.....

OPINION

Rendered on the 5th day of December, 1988

.....

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[No. 10579, 2]

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. . . . .

WILSON, J.

The plaintiff-appellee, Dayton Women's Health Center, Inc., provides reproductive health services for women including abortions. The other two plaintiffs are K.W. Davis, M.D. and Robert Skipton, M.D. The doctors are employed by the center and each has a private practice in Kettering.

In the fall of 1986, the plaintiffs filed a complaint alleging that the defendants, David Enix, Jim Mehaffie, David Mehaffie, Kim Mehaffie, Douglas Sapp, H.F. Perkins, and other unidentified persons, had engaged in tortious activity which

interfered with the delivery of medical service at the center and the private offices of the plaintiff doctors.

The prayer of the complaint was for damages and injunctive relief. The compliant also sought to have the case certified as a defendant class action.

After hearings an entry was filed on January 15, 1987 granting a preliminary injunction and certifying the case as a defendant class action whose class consists of:

> "all individuals protesting the activities conducted at the Dayton Women's Health Center, 3460 South Dixie Drive, Dayton, Ohio 45439, who have been personally served with this Entry and Preliminary Injunction as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of

> the Entry and Preliminary Injunction."

The trial court found that the defendants' conduct includes:

> 1) interference with the daily business operations of the Health Center including trespass upon the Health Center's property,
>
> 2) obstruction of the driveway which enters the Health Center's lot, and
>
> 3) interference with the flow of traffic on South Dixie Drive.

The trial court then issued a preliminary injunction enjoining the defendant class and the named defendants from:

1) Blocking or interfering with the access or egress of any individual going to or from the Dayton Women's Health Center.

2) Blocking or interfering with the driveway of the Dayton Women's Health Center.

3) Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients inside the Dayton Women's Health Center.

4) Trespassing on the property of the Dayton Women's Health Center.

5) Verbal communications, either in person or by telephone, with employees of the Center unless such communications are with the consent of such employees.

6) Picketing at or within viewing distance of the homes of such employees in groups of more than three (3) individuals.

7) Picketing at or within viewing distance of the offices of such employees in groups of more than five (5) individuals.

8) Picketing at or within viewing distance of the Dayton Women's Health Center in groups of more than ten (10) individuals.

9) Blocking or interfering with the flow of traffic on, from or to South Dixie Drive.

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10) Picketing on the west side of South Dixie Drive.

11) Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs.

12) Using any sign urging motorists to honk.

The order of January 15, 1987 also defined picketing:

> For the purpose of this Order, 'persons picketing' and a 'picket' include persons present in the area referred to in this Order who are carrying protest and informational signs, passing out literature, speaking publicly, or other wise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion.

The preliminary injunction order of January 15, 1987 was thereafter amended in several respects including an order dated February 27, 1987 which provides:

> It is the intention of this Court by this amendment to prohibit any residential picketing/demonstrations until such time the Court may fully review all the evidence presented in the hearing February 27, 1987.

The order of January 15, 1987 was again amended by an entry filed March 16, 1987. This order enjoined the defendants and the defendant class from:

1) Picketing in any form including parking, parading, or demonstrating on the west side of South Dixie Drive within the viewing distance of The Dayton Women's Health Center, and

2) Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of South Dixie Drive in

front of the facility in groups of more than ten (10) individuals.

The order further made clear that picketing goes to the mere presence of an individual.

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The Court also enjoined all of the defendants from:

> Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients of The Dayton Women's Health Center, employees of The Dayton Women's Health Center and physicians performing services at The Dayton Women's Health Center.

In the same order, the court refused to enjoin the defendants from using signs or communications that make any personal reference to patients or employees of the center.

Subsequently the plaintiffs voluntarily dismissed their claims for damages, and all parties then submitted the permanent injunction issue on the evidence presented at the previous hearings.

On July 10, 1987 a final order was filed permanently enjoining the named defendants and the defendant class from:

> 1. Blocking or interfering with the access or egress of any individual going to or from The Dayton Women's Health Center;
>
> 2. Blocking or interfering with the driveway of The Dayton Women's Health Center;
>
> 3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;
>
> 4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk;

5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;

6. Trespassing on the property of The Dayton Women's Health Center;

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7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;

8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;

9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;

10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within viewing of The Dayton Women's Health Center;

11. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

For purposes of this injunction, the term "picketing" includes, but is not limited to, parading, parking or any other form of demonstration. In fact, "picketing" goes to the mere presence of an individual.

The defendants have appealed. They have presented seven assignments of error. The first is:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND ALL PERSONS BY CERTIFYING THE DEFENDANT CLASS AND ISSUING AN INJUNCTION AGAINST ITS MEMBERS.

The order of January 15, 1987 determining that this case may be maintained as a class action was a final appealable order. [No. 10579, 7]

Amato v. General Motors Corp. (1981), 67 Ohio St. 2d 253. No notice of appeal was filed from that order within thirty days as required by App. R. 4(A). We have held that the order determining that a case may be maintained as a class action cannot be reviewed after the time for an appeal from the certification order has expired. *State ex rel. Randolph Storm v. The City of Dayton* (Dec. 21, 1981), Mont. App. No. 7308, unreported.

The first assignment of error is overruled.

The second assignment of error provides:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY ISSUING UNCONSTITUTIONALLY VAGUE AND CONTENT BASED RESTRICTIONS ON EXPRESSIVE ACTIVITY.

We agree with the appellants that the trial court recognized that time, place and manner restrictions on expressive activity must be content neutral to meet constitutional standards. *United States v. Grace* (1983), 461 U.S. 171. However, we disagree with the appellants' assertion that the injunction in this case was a content based restriction simply because its application was limited to the right-to-life advocacy defendants and pro-choice advocates were not so limited. Appellants have cited no authority in support of their view and we have found none. The second assignment of error is overruled.

In their third assignment of error, the appellants state:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY ISSUING AN INJUNCTION BASED UPON INADEQUATE FACTUAL FINDINGS WHICH WERE NOT SUPPORTED BY
>
> [No. 10579, 8]
>
> THE RECORD.

Under this assignment of error, the appellants contend that the injunction fails to comply with the specificity requirements of Civ. R. 65(D). They also contend that the findings of the trial court are contrary to the manifest weight of the evidence.

In our view the record reflects substantial compliance with Civ. R. 65(D) and the findings are supported by competent evidence. *Season Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77.

The fourth assignment of error provides:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY BANNING VERBAL COMMUNICATIONS WITH DWHC EMPLOYEES.

Paragraph 7 of the injunction prohibits the defendants from making "Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers."

We agree with the appellants that paragraph 7 is not a time, place, or manner restriction. It in effect prohibits all speech, including public issue speech, in any forum, including a traditional public forum. This prohibition of protected speech constitutes a prior restraint on speech.

States and courts do not have the power to prohibit peaceful political activity. *NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886.

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The United States Supreme Court has repeatedly held that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254 at 270. This case also makes clear that restrictions in public issue picketing are subject to careful scrutiny.

The fourth assignment of error is sustained.

The fifth assignment of error follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY IMPOSING NUMBERS AND PLACE RESTRICTIONS UPON PICKETING AT THE DWHC AND THE PRIVATE OFFICES OF THE PLAINTIFFS WHICH WERE NOT SUPPORTED BY THE EVIDENCE AND WHICH ARE UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

The appellants under this assignment of error are objecting to what appears to us to be content neutral time, place and manner restrictions.

The fifth assignment of error is overruled. *Akron Women's Clinic v. Right to Life of Greater Akron* (May 14, 1985),

summit App. No. 12394, unreported. *Akron Center for Reproductive Health v. North Coast Christian Community* (July 9, 1986), Summit App. No. 12414, unreported.

The appellants sixth assignment of error provides:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS AND DEFENDANT CLASS MEMBERS BY IMPOSING A BAN ON ANY PICKETING WITHIN VIEWING DISTANCE OF THE HOMES OF DWHC'S STAFF AND EMPLOYEES.

The total ban on residential picketing contained in the February 27, 1987 amendment to the preliminary injunction was not

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specifically included in the permanent injunction. However, paragraph 8 of the permanent injunction prohibited picketing at or within the viewing distance of the homes of patients, employees, staff or volunteers of the Center. The order further defined "picketing" in broad terms to include "the mere presence of an individual."

The record does not reflect where all of the employees or any of the patients of the center reside. There was testimony that the center has approximately fifty patients per week and that the center has been operating since 1973.

It is reasonably clear that one of the purposes of the injunction in this case was to preserve privacy and tranquility in the home. It is also reasonably clear that speech involved in this case was essentially public issue speech, *i.e.*, speech that participates in the process of representative democracy.

It may be that the mere fact that streets are residential might support more stringent restrictions on public issue picketing than non-residential street; however, it is "clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." *Frisby v. Schultz* (1988), 101 L.Ed 2d 420.

In *Frisby v. Schultz*, the Supreme Court upheld an ordinance banning "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Employing the principle that legislation should be given a narrow construction

[No. 10579, 11]

so as to avoid constitutional difficulties, the Supreme Court interpreted "picketing" to be "posting at a particular place," to wit: a particular residence. So interpreted, the picketing prohibited by the ordinance would consist of "having the picket proceed on a definite course or route in front of a [particular] home." 101 L.Ed. 2d 431.

General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, was held not to have been prohibited by the ordinance. Id. The significance of this interpretation of the ordinance was that, as so interpreted, the ordinance permitted the more general dissemination of a message. Only focused picketing taking place solely in front of a particular residence was prohibited. The Supreme Court held that the limited prohibition contained in the ordinance appropriately balanced the picketers' free speech interests with the resident's right to privacy, because it achieved the latter interest without impermissibly infringing the former.

In the case before us, the trial court's express definition of picketing, and the express scope of the restrictions on picketing, are much broader. Picketing is defined in the order to include the dissemination of literature and oral speech, activities not by their nature directed toward a particular residence. The order prohibits picketing, so defined, "at or within the viewing distance of the homes of patients * * *, employees * * * and physicians * * * at The Dayton Women's Health

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Center."

By its express terms, the trial court's order is too broad to be saved by a narrowing construction, as in *Frisby v. Schultz*. The general, door-to-door residential campaign, not directed at any particular residence, envisioned in *Frisby* as being an available alternative exercise of free speech rights, is not available in the case before us, since the order, by its express terms, prohibits

such activity within viewing distance of the homes of the patients, employees and physicians at the Center, and the defendant has no way of determining where those homes are located.

The injunction in this case in effect prohibits a prudent defendant from public issue picketing on public street in residential areas, and as such, impermissibly infringes upon a prudent defendant's exercise of his First Amendment right of free speech.

The sixth assignment of error is sustained.

The appellants last assignment of error is:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANTS AND DEFENDANT CLASS MEMBERS BY IMPOSING VOLUME RESTRICTION UPON THEIR SPEECH WHICH WERE NOT SUPPORTED BY ITS FINDINGS AND WHICH ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Paragraph 5 of the injunction prohibits the defendants from "speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside the Dayton Women's Health

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Center."

This volume restriction of speech is content neutral. It focuses on the manner of expression.

We agree with appellants, however, that as written, paragraph 5 of the injunction is overbroad. It prohibits verbal communications outside the Center that are heard within, even though it is not reasonably foreseeable that they would be heard within. Appellants point out that the Center has been known to open its windows during the summer months.

Faced with otherwise reasonable volume restrictions that it found to be overbroad, the United States Court of Appeals for the Ninth Circuit in a recent case modified the order consistently with its overbreadth concerns. *Portland Feminist Women's Health Center v. Buhler* (Oct. 6, 1988), 9th Cir. No. 86-4102, 57

U.S.L.W. 2239. We are permitted to do the same in the case before us, by virtue of App. R. 12(A), which provides that a court of appeals may modify the judgment of a trial court. Accordingly, we elect to modify paragraph numbered 5 of the injunction to read as follows:

> 5. Speaking, chanting, yelling or verbally communicating in any manner designed or intended to reach the staff or patients or volunteers inside The Dayton Women's Health Center, or in such a volume that it is reasonably apparent that the communications, are likely to be heard by the staff or patients or volunteers inside The Dayton Women's Health Center.

So modified, the restrictions contained in paragraph 5 are
[No. 10579, 14]
reasonable.

The last assignment of error is sustained.

The permanent injunction issued July 10, 1987 is amended by amending paragraph numbered 5 as set forth above, and by deleting paragraphs numbered 7 and 8. As amended, the order is affirmed.

FAIN, J., concurs

KERNS, J., dissenting in part and concurring in part:

While the residential character of a street may support reasonable time, place, and manner restrictions, it is beyond the power of government, including the courts, to completely close a public forum to constitutionally protected first amendment rights. *Frisby v. Schultz*, 101 L.Ed 2d 420. Hence, this case turns upon the reasonableness of the proscriptions contained in the injunction entered by the Common Pleas Court on July 10, 1987.

In balancing the first amendment rights and privacy rights of the plaintiffs and defendants, I have encountered no difficulty with the restrictions imposed by the first, second, third, fourth, sixth, ninth, and twelfth parts of the injunctive order, but in my opinion, the fifth, seventh, eighth, tenth, and eleventh parts of the injunction are too vague and overbroad to survive

constitutional scrutiny. In fact, the notation in the injunction order itself that picketing "goes to the mere presence of an individual" appears to infringe unnecessarily and impermissibly upon free speech.

[No. 10579, 15]

Accordingly, I would overrule the first and second assignments of error and sustain the third, fourth, fifth, sixth and seventh assignments of error. Then, pursuant to Civ. R. 65(D), the cause should be reversed and remanded to the trial court for an injunction which describes in detail the acts sought to be restrained and gives specific guidance to the parties to the action.

Filed December 8, 1988

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

The Dayton Women's Health Center, et al.	:	
Plaintiffs-Appellees	:	Case No. 10579
	:	
v.	:	
	:	
David Enix, et al.	:	**FINAL ENTRY**
Defendant-Appellants	:	

.....

Pursuant to the opinion of this court rendered on the 5th day of December, 1988, the permanent injunction issued by the trial court on July 10, 1987 is amended by deleting paragraphs numbered 7 and 8, and by amending paragraph numbered 5 to read as follows:

> 5. Speaking, chanting, yelling or verbally communicating in any manner designed or intended to reach the staff or patients or volunteers inside The Dayton Women's Health Center, or in such a volume that is is reasonably apparent that the communications are likely to be heard by the staff or patients or volunteers inside The Dayton Women's Health Center.

As modified, the permanent injunction issued by the trial court on July 20, 1987, is Affirmed.

_____
JOSEPH D. KERNS, Pres. Judge

/s/_____
RICHARD K. WILSON, Judge

/s/_____
MIKE FAIN, Judge

The Supreme Court of Ohio

1990 TERM

To wit: June 20, 1990

Dayton Women's Health Center, et al., Appellees,	:	Case No. 89-221
v.	:	JUDGMENT ENTRY
	:	CERTIFIED BY THE
David Enix et al., Appellants.	:	COURT OF APPEALS

This cause, here on certification of conflict by the Court of Appeals for Montgomery County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellees recover from the appellants their costs herein expended; and that a mandate by [*sic*] sent to the Court of Appeals for Montgomery County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Montgomery County for entry.

(Court of Appeals No. 10579)

/s/ Thomas J. Moyer

Thomas J. Moyer
Chief Justice

DAYTON WOMEN'S HEALTH CENTER ET AL., APPELLEES, V. ENIX ET AL., APPELLANTS.

[Cite as Dayton Women's Health Ctr. v. Enix (1990), 52 Ohio St. 3d 67.]

Civil procedure - Class actions-Determination that action shall or shall not be maintained as class action is a final appealable order-Civ. R. 23(C) and App. R. (A).

O.Jur 3d Appellate Review Sec. 64.

An order of a trial court, pursuant to Civ. R. 23(C), determining that an action shall or shall not be maintained as a class action, is a final appealable order, and a party must appeal such an order within thirty days pursuant to App. R. 4(A). (*Amato v. General Motors Corp.* [1981], 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, syllabus, approved and followed; *Roemisch v. Mutual of Omaha Ins. Co.* [1974], 39 Ohio St. 2d 119, 68 O.O. 2d 80, 314

[52 Ohio St. 3d 68]

N.E. 2d 386, syllabus, approved and followed; R.C. 2505.02, construed and applied.)

(No. 89-221-Submitted February 14, 1990 - Decided June 20, 1990.)

CERTIFIED by the Court of Appeals for Montgomery County, No. 10579.

The Dayton Women's Health Center, Inc. ("DWHC") is a non-profit corporation located in Dayton, Ohio. The DWHC provides reproductive health care services, including pregnancy tests, pelvic examinations, medical evaluations, and early pregnancy terminations (abortions).

Beginning in June 1986, defendants-appellants, David Enix, Jim Mehaffie, David Mehaffie, H.F. Perkins and other unnamed individuals began picketing at the DWHC. Allegedly, appellants began trespassing, threatening others with violence, and creating excessive noise which interfered with the center's operations. Before the lawsuit was filed, there were as many as seventy persons or more demonstrating at or around the DWHC.

On October 14, 1986, plaintiffs-appellees, Dayton Women's Health Center and its staff doctors, K.W. Davis, M.D.,

and Robert Skipton, M.D., filed a complaint, later amended, requesting that a preliminary and permanent injunction be issued, as well as damages assessed, against appellants. At that time, appellees moved to have the case certified as a defendant class action.

The trial court then conducted hearing son appellants' motion to strike the class allegations and appellees' motion for a preliminary injunction. On January 15, 1987, the court certified a defendant class defined as "all individuals protesting the activities conducted at the Dayton Women's Health Center * * * who have been personally served with this entry * * * " and issued a preliminary injunction against appellants which included the certified class. Subsequently, on January 22, 1987, the court issued a supplemental order which detailed a procedure for adding members to the defendant class.[1]

Next, appellees filed a motion to modify the court's injunction in order to conform to certain alleged misconduct by appellants. On March 16, 1987, the court issued its decision and entry supplementing and modifying its original injunctive order.

After the filing of various contempt motions, and motions to dismiss and to compel discovery, the appellees voluntarily dismissed their claims for money damages pursuant to Civ. R. 41(A)(1), and allowed the case to be submitted to the court on their request for a permanent injunction on the evidence submitted at the previous evidentiary hearings. On July 10, 1987, the court issued a decision and entry ordering the appellants, which included the defendant class members, permanently enjoined in accordance

[52 Ohio St. 3d 69]

with the previous orders of the court. In its entry the court also overruled appellants' motion to decertify the class. The

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1. The trial court provided in its supplemental order that "[t]he Dayton Women's Health Center employ the following procedure for adding members to the defendant class:

> "1. Any employee of The Dayton Women's Health Center is hereby designated as an agent of this Court for the purpose of personally serving a copy of this Entry and Preliminary Injunction on any individual found to be protesting the activities conducted at The Dayton Women's Health Center. * * * "

appellants, who also represented the defendant class members, then appealed the trial court's decision.

The court of appeals modified and affirmed the permanent injunction, and further held that the defendant class members failed to properly bring an appeal of their class certification. Specifically, the court held the January 15, 1987 order certifying the defendant class was a final appealable order, which required the class members to appeal within thirty days of the certification under App. R. 4(A).

The court of appeals, finding its decision to be in conflict with the decision of the *Court of Appeals for Hamilton County in Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (June 27, 1986), No. C-860430, unreported, certified the record of the case to this court for review and final determination.

Bieser, Greer & Landis and *David C. Greer*, for appellees.

Thomas E. Grossmann and *Robert Huffman*, for appellants.

Robert R. Melnick, Kenneth Shaw and *John W. Whitehead*, urging reversal for *amicus curiae*, Rutherford Institute of Ohio.

HOLMES, J. The sole issue certified for our review is whether the certification of a defendant class action is a final appealable order that *must* be appealable within the time allotted under App. R. 4(A).[2] For the reasons which follow, we decide that such class certifications are final appealable orders which *must* be appealed within thirty days pursuant to App. R. 4(A).

"Final appealable orders" are defined in R.C. 2505.02, as follow:

"An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or

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2. Although appellants argue several propositions of law related to the range and extent of the permanent injunction, we choose only to address the sole question certified to us by the court of appeals.

an order vacating or setting aside a judgment and ordering a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial. * * *" (Later amended March 1987.)

This court addressed the issue of the appealability of class certifications in *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, syllabus, by holding that "[a]n order of a trial court, pursuant to Civ. R. 23(C)(1), determining that an action may be maintained as a [plaintiff] class action is a final, appealable order, pursuant to R.C. 2505.02." In deciding that class certifications are in effect special proceedings under R.C. 2505.02, the *Amato* court announced a balancing test to be applied in theses proceedings:

"This test weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." *Id.* at 258, 21 O.O. 3d at 161, 423 N.E. 2d at 456.

Similarly, in *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 68 O.O. 2d 80, 314 N.E. 2d 386, syllabus, this court held that an order denying plaintiff class action status was a final appealable order under
[52 Ohio St. 3d. 70]
R.C. 2505.02, since "such [an] order clearly affects a 'substantial right' of *the class* which 'in effect determines the action and prevents a judgment' adverse or favorable to *the class.*" (Emphasis *sic.*) *Id.* at 122, 68 O.O. 2d at 81, 314 N.E. 2d at 388. Therefore, pursuant to R.C. 2505.02 an appeal will lie directly from an order certifying or denying class action status.

Although *Amato* and *Roemisch* dealt with the appealability of plaintiff class actions, we find little reason not to apply the holding in those cases to defendant class actions. Clearly, the potential plaintiff or defendant will be equally prejudiced in asserting his or her rights in a defendant or plaintiff class action depending on the certification ruling by the trial court. See, *e.g., Planned Parenthood Assn. of Cincinnati v. Project Jericho* (1990), 52 Ohio St. 3d 56, ___ N.E. 2d ___. (Plaintiff requested that defendant class action be certified in order to

enjoin the defendant class from engaging in certain conduct.) Usually, defendant class actions are requested in suits seeking injunctive relief under Civ. R. 23 (B)(2) when there are several defendants who have been charged with a common responsibility for implementing or enforcing a particular challenged code provision or who have otherwise acted in common under an industry-wide practice or collective bargaining agreement, or have had some other interrelationship to one another that bears directly on the challenged conduct in the litigation. 1 Newberg, Newberg on Class Actions (2 Ed. 1985) 133, Section 3.02. Both plaintiff and defendant class actions arise because of the litigation strategies adopted primarily by the plaintiff's counsel under the particular circumstances. Furthermore, "[w]hether the action is claimed to be a class action is solely of plaintiff's choosing, although the defendant may request class treatment in unusual circumstance." Alpert, Class Action Manual (National Consumer Law Center 1977) 190, quoted in Newberg on Class Actions, *supra*, at fn. 23.

Appellants assert that although a class determination is a final appealable order, "an immediate appeal from an order certifying a defendant class is permissive, not mandatory." We disagree. Ohio's App. R. 4(A) states in pertinent part that: "In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment *or order appealed from*. * * *" (Emphasis added.) Clearly, App. R. 4(A) requires that an appeal be filed within thirty days of a final appealable order.[3] Thus, an order of a trial court, pursuant to Civ. R. 23(C), determining that an action shall be maintained as a class action, is a final appealable order, and a party must appeal such an order within thirty days of the date of entry pursuant to App. R. 4(A).

In the case *sub judice* appellants failed to appeal the January 15, 1987 certification of the defendant class. Instead,

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3. We recommend that the rules Advisory Committed appointed by this court review whether an amendment to App. R. 4(A) should be adopted in order for a party to have the option of appealing an interlocutory final appealable order after final judgment is rendered in a case.

they chose to appeal the propriety of the certification on July 10, 1987, when the trial court issued a decision and entry permanently enjoining the defendant class members. Consequently, appellants waived their right to challenge the class certification on appeal.[4]
[52 Ohio St. 3d. 71]

Therefore, for the foregoing reasons, the decision of the court of appeals is affirmed as to the issue on certification.

Judgment affirmed.

MOYER, C.J., WRIGHT and H. BROWN, JJ., concur.

H. Brown, J., concurs separately.

Sweeney, Douglas and *Resnick*, JJ., dissent.

H. BROWN, J., concurring. I join the syllabus and opinion. An order certifying a class action, if it affects a substantial legal right, qualifies as a special proceeding under R.C. 2505.02 and is thus appealable. This was the holding in *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452. That decision has stood for nine years and has neither undermined the stability of the law nor bred great confusion. I am not prepared to overrule *Amato*.

I write separately because I believe the Ohio law with respect to final appealable orders presents a dilemma when applied to class action issues. If the order certifying a class action is not immediately appealable, the results of a protracted, complex trial (which class actions usually are) could by nullified by an error in the certification which bears no relationship to the validity of the claims of class members (perhaps numbering into the thousands) on the merits.

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4. Under App. 3(A) the court of appeals is permitted to dismiss cases where appellants have failed to timely file their appeals. App.R.3(A) provides: "An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. * * *."

On the other hand, if certification orders are immediately appealable, an appeal could be used as a tool to delay proceedings.

There is the further problem presented by amendments to class certification. Each time a modification is made to a class order, is that appealable? I do not read today's decision as a definitive resolution of all appealability questions which may arise from class action determinations.

The problem, as applied to class actions, stems from the requirement in Ohio that an order be classified as appealable (in which case an appeal must be taken or lost) or nonappealable (in which case no appeal may be taken) regardless of the desirability of having the issue determined before the resources of the parties and the court are expended on the merits.

What is needed is a rule which would make immediate appeals of class certifications permissible but not mandatory. Discretion should be given to the trial judge to determine when the interests of justice and judicial economy will be served by review of a class action order before launching into the trial on the merits.

Such an approach is permitted in the federal courts. Federal district courts may certify for appeal to the courts of appeals an order certifying a class, pursuant to Section 1292, Title 28, U.S. Code, which states in part:

"(b) When a district judge, in making in a civil action an order no otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may
[52 Ohio St. 3d. 72]
materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court

unless the district judge or the Court of Appeals or a judge thereof shall so order."

Other states have adopted rules which attempt to solve the peculiar "appealability" problems presented in class actions. See, *e.g.*, Ar. App. R. 2(a)(9); Ga. Ct. App. R. 29; Ill. Supreme Court Rule 308; Ind. App. R. 4(B)(6); and Tex. App. R. 43(a).

I urge the consideration of a rule in Ohio which would avoid the necessity of choosing between the positions taken in today's case by the majority and dissenting opinions. Until such time as a rule change is accomplished, however, I believe that we should adhere to precedent and that orders certifying a class action are appealable under the "special proceeding" language of R.C. 2505.02.

DOUGLAS, J., dissenting. *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, was improperly decided by this court and the majority's continued reliance upon it breeds confusion and promotes uncertainty in an area of law which is in great need of clarification and stability. In my judgment, *Amato* should be overruled, and I stand ready to do so.

R.C. 2505.03(A) states, in relevant part, that "[e]very final order * * * may be reviewed on appeal * * *."

R.C. 2505.02[5] defines what types of orders are final: (1) an order affecting a substantial right in an action which in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding or made upon summary application after judgment; or (3) an order vacating or setting aside a judgment or granting a new trial. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St. 3d 86, 87-88, 541 N.E. 2d 64, 67. The issue presented in the case at bar concerns only the *second* part of R.C. 2505.02 - an order

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5. R.C. 2505.02 provides in relevant part:

> "An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial."

affecting a substantial right made in a *special proceeding* or made upon summary application after judgment.

The court in *Amato* announced a "balancing test" to be utilized in determining whether an order is made in a "special proceeding." The balancing test "* * * weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from he allowance of an appeal, with the need for immediate review because appeal after final judgment is not practicable." *Id.* at 258, 21 O.O. 3d at 161, 423 N.E. 2d at 456. Certainly, this court can devise a definition for "special proceeding" which will not depend upon which way the *Amato* scale of justice tips on any given day. The *Amato* balancing test is comprised of nothing

[52 Ohio St. 3d. 73]

more than meaningless verbiage to the practicing attorney who has received an order and must decide whether or not to file a notice of appeal.

According to *Amato*, a proceeding is defined as "special" (or not "special") only when a majority of a reviewing court finds that the balance tips in favor of review, and when the reviewing court is a court of appeals even that decision can be changed by this court on appeal. If the balance tips in favor of review, any order affecting a substantial right which was rendered in a civil proceeding is a final appealable order which must be appealed within thirty days.[6] What about members of the bar in this state who never timely file notices of appeal regarding an order made in a proceeding thinking all the while that the Amato balancing test would tip in one direction and then, sometime thereafter, a reviewing court rules that the proceeding was "special"? The answer is, of course, that appeal rights are forever lost and colorable claims for malpractice arise. Hence, there are two lessons to be learned from *Amato*. First, every order that affects a substantial right in *any* proceeding should immediately be appealed since what may be defined as an order made in a "special proceeding" may change day to day under *Amato*. In this vein, Amato makes the filing of a notice of appeal like

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6. See App. R. 4(A).

attempting to shoot a moving target. The other lesson *Amato* teaches us is that the payment of malpractice insurance premiums for practicing attorneys is essential.

In my judgment, this court should strive to promote clarity and stability in the law. Today's majority opinion simply runs afoul of these notions by relying on *Amato*.

The General Assembly has determined that orders affecting a substantial right made in a "special proceeding" are final orders which may be appealed. On occasion, this court has made certain proceedings "special proceedings" regardless of whether the given proceeding was "special" at all. Today, the majority takes what may be the ultimate step in this dangerous direction.

A "special" proceeding is a proceeding which is unusual or extraordinary. See *e.g.*, Black's Law Dictionary (5 Ed. 1979) 1253. In *State v. Thomas* (1980), 61 Ohio St. 2d 254, 15 O.O. 3d 262, 400 N.E. 2d 897, paragraph one of the syllabus, this court held that denial of a motion to dismiss a criminal charge, based upon a claim of double jeopardy, is a special proceeding. This court has also granted a party the right to immediately appeal an adverse ruling on a discovery matter, as an order made in a special proceeding. See *Humphrey v. Riverside Methodist Hospital* (1986), 22 Ohio St. 3d 94, 22 OBR 129, 488 N.E. 2d 877. Now the majority of this court holds that an order, pursuant to Civ. R. 23, *granting* class action status is an order made in a special proceeding.

There is absolutely nothing "special" about proceedings under the Rules of Criminal or Civil Procedure. There is nothing unusual or extraordinary about proceedings that are a part of our everyday civil or criminal practice.[7]

As I have stated on a previous occasion, I believe that:

"A special proceeding is an action

[52 Ohio St. 3dl 74]

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7. For an additional case, *not* based on either the Civil or Criminal Rules, creating yet another exception to the final appealable order rule, see *Tilberry v. Body* (1986), 24 Ohio St. 3d 117, 24 OBR 308, 493 N.E. 2d 954.

not recognized at common law or part of our standard civil practice. It is one that has been brought about by specific legislation which creates a special type of action. Examples would be forcible entry and detainer, declaratory judgment, appropriation or arbitration." *Stewart v. Midwestern Indemn. Co.* (1989), 45 Ohio St. 3d 124, 128, 543 N.E. 2d 1200, 1204 (Douglas, J., dissenting).

Therefore, a special proceeding is an action: (1) which has been brought about by specific legislation creating a special type of action; (2) *and is either* (a) not recognized at common law, *or* (b) not part of our standard civil (or criminal) practice. An order *granting* certification of a defendant (or plaintiff) class does not meet this definition.

Class actions are governed by Civ. R. 23. Civ. R. 23 was created not by specific legislation but, rather, was adopted in Ohio by legislative inaction. See Section 5(B), Article IV, Constitution. As such, a class action proceeding is not a special proceeding. Further, merely for purposes of discussion, the class action proceeding in question *is* part of our standard civil practice and a proceeding in the nature of granting certification of a defendant class *did* exist at common law in the form of equitable bills of peace.[8] Accordingly, the proceeding in

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8. At common law, a bill of peace could be sought to avoid a multiplicity of legal actions. The bill provided a mechanism in which similar claims asserted by a plaintiff against a multitude of defendants could be determined in one equity suit. See 1 Pomeroy Equity Jurisprudence (5 Ed. 1941), Sections 245 *et seq.*; Chafee, Bills of Peace With Multiple Parties (1932), 45 Harv. L. Rev. 1297 ("The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together.' In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before. A potent device for this purpose is the bill of peace in equity."); and 27 American Jurisprudence 2d (1966) 574-575, Equity, Section 51.

The granting of the bill of peace would, in effect, result in the joinder of multiple defendants and the plaintiff's claims against all defendants could be maintained in one consolidated lawsuit. The granting of a bill of peace was, therefore, much like the granting of certification of a defendant class. See Civ. R. 23. Indeed, it has been said that Fed. R. Civ. P. 23 is a product of the equitable bill of peace:

question not only fails the first prong of the special proceeding test outlined above (which is dispositive of the matter) but also fails both alternative parts of the second prong.

I agree with today's majority that the *denial* of a class certification is ap-

[52 Ohio St. 3d. 75]

pealable as a final order. In my view, the issue concerning the denial of class certification was not properly before this court given the facts of the case *sub judice*, but I pass judgment on the issue only to clarify the distinction between *granting* and *denying* class certification.

As indicated, there are three types of orders which are final. An order *granting* or *denying* class certification is not a final order of the second type (an order affecting a substantial right made in a special proceeding) because such an order is made in a proceeding which is not "special." Nor is an order *granting* class certification a final order of the first type (an order affecting a substantial right in an action which in effect determines the action and prevents a judgment). An order allowing a lawsuit to be maintained as a class action does not determine the action or prevent a judgment. The order simply does neither but, rather, the order granting class status is a necessary step to a final determination of the class action lawsuit.

Conversely, an order *denying* class certification is a final order of the *first* type because the order affects a substantial right of the class and in effect determines the action and prevents a judgment for the class. See *Roemisch v. Mutual of Omaha Ins.*

"* * * Defendant class actions have a long and rich history in English common law. The earliest class actions, or bills of peace in the nature of class actions, brought in English Chancery Courts of the seventeenth and eighteenth centuries were largely defendant class actions in which the plaintiff needed to join numerous parties defendant in order to receive an effective remedy. * * * "* * *

"Defendant class actions have a long history in the United States. As early as 1853, the Supreme court in *Smith v. Swormstedt* [(1853), 57 U.S. (16 How.) 288] upheld an action by a plaintiff class against a defendant class noting the well-established common law rule which permits such class suits. Authority for plaintiff and defendant classes was codified in Federal Equity Rule 38, recodified in Federal Rule of Civil Procedure 23, and carried forward to current Rule 23 in the 1966 amended version." (Footnotes omitted.) Newberg, 1 Newberg on Class Action (2 Ed. 1985) 373-375, Section 4.45.

Co. (1974), 39 Ohio St. 2d 119, 122, 68 O.O. 2d 80, 81, 314 N.E. 2d 386, 388. Therefore, an order *denying* class certification is a final order of the *first* type, but not the second; whereas, an order *granting* class certification is not a final order of either the first or second type.

Finally, even if I were to accept the balancing test of *Amato* as a determinant of whether a given order is made in a special proceeding, I believe that the test as applied to orders granting class certification balances in favor of no immediate review. If an order granting class certification is immediately appealable, the class action lawsuit may never be finally litigated. A certification order can be altered, amended, modified or vacated and each change in the class or creation of a new subclass would result, if objected to, in numerous new appeals. Delays in the class action lawsuit could last indefinitely. Such delays and the consequent waste of judicial resources, if the class is decertified or the order is vacated, weigh heavily against permitting immediate appeals. On the other hand, review after final judgment is practicable, in that it would promote the prompt and orderly disposition of the litigation, and far fewer judicial resources would be used, with none being wasted.

For the foregoing reasons, I dissent.

SWEENEY, J., concurs in the foregoing dissenting opinion.

ALICE ROBIE RESNICK, J., dissenting. I respectfully dissent from the majority's holding that an order, "pursuant to Civ. R. 23(C) determining that an action *shall* or *shall not* be maintained as a class action, is a final appealable order * * *." (Emphasis added.) A ruling that an action may be maintained as a class action is totally different from the denial of certification. Hence, I cannot initially accept that they both should be treated the same on the issue of appealability as final orders.

The majority bases its holding on *Amato v. General Motors Corp.* (1981), 67 Ohio St. 2d 253, 21 O.O. 3d 158, 423 N.E. 2d 452, wherein it was held that certification affects a substantial right and is made in a special proceeding. I agree that class certification affects a substantial right. However, I do not agree that it is done in a "special proceeding." Additionally, I can find no

[52 Ohio St. 3d. 76]
support for such a holding concerning class certification either in Ohio or other jurisdictions.

Recently this court determined that an order in a declaratory judgment action pursuant to R.C. Chapter 2721 affected a substantial right in a special proceeding in *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St. 3d 17, 540 N.E. 2d 266. However, a declaratory judgment is an independent action determining legal rights. This is not the case with certification of a class action, which is a preliminary procedure. To term a preliminary procedure provided by rule a special proceeding would consequently have broad ramifications and open the door to a flood of piecemeal appeals.

Consequently, if class certification is not a special proceeding, in order for it to be a final order, we must consider the remaining criteria found in R.C. 2505.02 which define final orders other than ones made in special proceedings. R.C. 2505.02 defines "final order" as including "[a]n order that affects a substantial right in an action which in effect determines the action and prevents a judgment * * *." Class certification does neither. We simply have to look to Civ. R. 23(C)(1), which provides as follows:

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision *may be conditional, and may be altered or amended before the decision on the merits.*" An order which may be changed or modified is interlocutory.

"* * * An interlocutory judgment is provisional or preliminary; it is made before a final decision, for the purpose of ascertaining a matter of law or fact preparatory to a final judgment, or it determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court.

* * * For some purposes, a judgment is not regarded as final until expiration of the period which the judgment remains *within the inherent power of the court to modify or vacate* * * *."

(Footnotes omitted; emphasis added.) 47 American Jurisprudence 2d (1969) 123-124, Judgments, Section 1053.

From this it can be seen that certification of a class neither determines the action nor prevents a judgment. At any time during the proceedings the court can decertify part or all of the class. It would be wholly inconsistent with a considerable line of cases to hold that if a party opposing certification does not appeal within thirty days of certification its right to appeal is lost. The reason is that at any time during trial of the certified class action the court may change its previous order. There would be no reason for a party to attempt an appeal from such an obviously interlocutory order.

Other jurisdictions have held that certification of a class action is not immediately appealable. The court in *Pincus v. Mut. Assurance Co.* (1974), 457 Pa. 94, 321 A. 2d 906, stated:

"We note at the outset that an order permitting a suit to proceed as a class action is not only an interlocutory order, but also that it is the type of interlocutory order which is not usually appealable. *Piltzer v. Independence Federal Savings and Loan Association*, 452 Pa. 402, 319 A. 2d 677 (1974). *See also Thill Securities Corp. v. New York Stock Exchange*, 469 F.2d 14, 17 (7th Cir. 1972); *Walsh v. Detroit*, 412 F.2d 226 (6th Cir. 1969); 9 J. Moore, Federal Practice 110.13[9], at 184-87 (2d Ed. 1973)." *Id.* at 96-97, 321 A. 2d at 908.

"Since the appellants' claim is, in
[52 Ohio St. 3d. 77]
reality, an objection to the propriety of the class action, it can properly be resolved on appeal after final judgment below. To hold otherwise would encourage piecemeal determinations and consequent protraction of litigation. *Piltzer, supra*." *Id.* at 98, 321 A. 2d at 909.

Arizona has a statute similar to Ohio's as to final judgments. Section 12-2101, Ariz. Rev. Stat. Additionally, Arizona R. Civ. P. 23(c)(1) is identical to Ohio's in that it provides that such an order "may be altered or amended before the decision on the merits." Arizona has also held that denial of a motion for decertification of a class is an interlocutory order and cannot be immediately appealed since it neither determines

the action nor prevents a judgment. See *Eaton v. Unified School Dist. No. 1 of Pima Cty.* (App. 1979), 122 Ariz. 391, 595 P. 2d 183, affirmed (1979), 122 Ariz. 377, 595 P. 2d 169.

This court in *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 68 O.O. 2d 80, 314 N.E. 2d 386, held in the syllabus that: "An order of a trial court, pursuant to Civ. R. 23(C)(1), determining that an action may not be maintained as a class action is a final, appealable order, pursuant to R.C. 2505.02." Other jurisdictions have similarly held that denial of class certification is final. See *Darr v. Yellow Cab Co.* (1967), 67 Cal.2d 695, 63 Cal. Rptr. 724, 433 P. 2d 732 (the California Supreme Court concluded that a class action termination order was in legal effect a final judgment from which an appeal lies); *Reader v. Magma-Superior Copper Co.* (1972), 108 Ariz. 186, 494 P.2d 708; *McConnell v. Commonwealth of Pennsylvania, Dept. of Rev.* (1983), 503 Pa. 322, 469 A. 2d 574; *In re Estate of Freedman* (1982), 307 Pa. Super. 413, 453 A. 2d 651. The reasoning that such orders are final is usually based upon the "death knell" theory which was rejected in *Coopers & Lybrand v. Livesay* (1978), 437 U.S. 463, 477, wherein the court stated that:

"Accordingly, we hold that the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not sufficient reason for considering it a 'final decision' within the meaning of 1291 [, Title 28, U.S.]." Thus, this issue was settled in the federal courts. The *Livesay* decision also commented on the fact that under Fed. R. Civ. P. 23 (c)(1) an order involving class status may be "altered or amended before the decision on the merits." *Id.* at 469, fn. 11. Even if a *denial* of certification of a class were immediately appealable on the basis that the denial prevented a judgment and was a death knell to the action, there is no basis for similar treatment of a *grant* of certification.

In the instant case the trial court certified the class of defendants. The defendants proceeded with the case and did not attempt to seek an immediate appeal. The majority now chooses to affirm the dismissal of defendants' appeal, relying on the holding of *Amato, supra*.

If we were to accept that class certification is a special proceeding we still would not have a final appealable order since the trial court pursuant to Civ. R. 23(C)(1) may change its order of certification at any time prior to a decision on the merits. Such an order is clearly interlocutory and cannot be considered a final appealable order under R.C. 2505.02. It is interesting to note that an Illinois Supreme Court Rule succinctly accomplishes what this court is trying to do through case law.[9]
[52 Ohio St. 3d. 78]
To allow this appeal now is for this court to engage in judicial legislation. R.C. 2505.02 was never intended to apply to actions such as the one before this court.

Based upon the foregoing, I would allow the appellant the right to raise the issue of class certification and would decide this issue upon the merits.

---

9. The Illinois Supreme Court has adopted Supreme Court Rule 308 which allows interlocutory appeals in certain circumstances.

"Interlocutory Appeals by Permission

"(a) Requests. When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order." Cf. Section 1292(b), Title 28, U.S. Code.

The Supreme Court of Ohio

1990 TERM

To wit: June 20, 1990

Dayton Women's Health Center et al., Appellees,	:	Case No. 89-221
v.	:	MANDATE
David Enix et al., Appellants.	:	

To the Honorable Court of Appeals

Within and for the County of Montgomery, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Motion Fee, $20.00, paid by Melinda Berry.

(Court of Appeals No. 10579)

/s/ Thomas J.Moyer

Thomas J. Moyer
Chief Justice

The Supreme Court of Ohio

1990 TERM

To wit: June 20, 1990

Dayton Women's Health Center et al., Appellees,	:	Case No. 89-221
v.	:	REHEARING ENTRY
David Enix et al., Appellants.	:	(Montgomery County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 10579)

/s/ Thomas J. Moyer

THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS

MONTGOMERY COUNTY, OHIO

THE DAYTON WOMEN'S HEALTH CENTER, et al., Plaintiffs,	: CASE NO. 86-3620 : (Judge John M. Meagher)
v.	: DECISION, ENTRY & ORDER SUSTAINING PLAINTIFF'S MOTIONS FOR CONTEMPT IN PART; OVERRULING IN PART; AWARDING ATTORNEY FEES; MODIFYING INJUNCTION; OVERRULING DEFENDANTS' MOTION TO DISMISS AND STAY PROCEEDINGS.
DAVID ENIX, et al., Defendants.	

This matter is before the Court on plaintiffs' motions for contempt, sanctions, and modification of the Court's injunction with regard to residential picketing; and on defendants' motions to dismiss and to stay these proceedings.

The Court will first address defendants' motion to stay. After careful consideration, the Court finds that defendants' motion is unfounded. The motions before this Court are ripe for decision and it is no longer necessary or proper to delay their resolution. Accordingly, defendants' motion to stay is overruled.

On December 5, 1988, the Court of Appeals of Montgomery County, Ohio, in The Dayton Women's Health Center v. David Enix, No. 10579, unreported, (C.A. Ohio Dec. 5, 1988), rendered its opinion concerning defendants' challenge to this Court's

permanent injunction of July 10, 1987. The Court of Appeals ordered that Paragraph 5 be amended by adding the phrase, "in such a volume that it is reasonably apparent that communications are likely to be heard by staff or patients or volunteers inside The Dayton Women's Health Center." Paragraph 5 to this Court's permanent injunction is so amended.

On September 13, 1988, Tammy Silvey and Corina Sumner, while picketing behind The Dayton Women's Health Center in violation of this Court's injunction, raised their voices to such a level that a woman inside an adjoining building approximately thirty feet away orally complained to both Ms. Silvey and Ms. Sumner that it was extremely difficult to concentrate while they alternately yelled, screamed, and otherwise raised their voices toward patients and staff inside plaintiffs' building. This conduct was not in violation of the Court's permanent injunction of July 10, 1987, because of the Court of Appeals' finding that paragraph 5, as written, was overbroad. However, paragraph 5, as modified by the Court of Appeals, now clearly forbids this conduct.

The Court of Appeals also found Paragraphs 7 and 8 of this Court's injunction to be objectionable. Paragraph 7 is now so deleted.

Although the Court of Appeals found that Paragraph 8's purpose was constitutional, as written, it was too broad and would not withstand constitutional scrutiny. This Court sustains plaintiffs' motion to modify Paragraph 8 in order to make it consistent with the Court of Appeals' opinion. Paragraph 8, which is renumbered as Paragraph 7, is hereby modified to read as follows:

> Picketing in any form, including parking, parading or demonstrating which is *limited* to the homes of patients, employees, staff, or volunteers of The Dayton Women's Health Center or the physicians performing services at The Dayton Women's Health Center; (emphasis added.)

This paragraph prohibits picketing which is limited to a particular home of a patient, employee, staff member, volunteer, or physician of The Dayton Women's Health Center. This language also covers picketing on a definite course or route in front of a particular home of a patient, employee, staff member, volunteer, or physician of The Dayton Women's Health Center. On the other hand, general marching through residential neighborhoods, or walking a route in front of an entire block of houses is not prohibited.

The Court also finds it necessary to modify Paragraph 4 of the permanent injunction. On various occasions defendants have moved their arms in an up an down motion to oncoming traffic, thereby urging traffic to honk their horns at a place immediately in front of The Dayton Women's Health Center. Such behavior is a safety hazard and a threat to the public health and safety of those who are peaceably utilizing South Dixie Drive.

Paragraph 4 is hereby modified to read as follows:

> Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs; i.e., stop signs, or using any sign urging motorists to honk their horns, including hand and arm signals;

On numerous occasions, defense counsel has misinterpreted Paragraph 6 of this Court's permanent injunction. Therefore, the Court will clarify defense counsel's misinterpretation. Trespassing "on the property of" the Dayton Women's Health Center is located. If a picketer walks onto the parking lot owned, belonging to, or utilized by the Dayton Women's Health Center, that picketer is trespassing in violation of Paragraph 6.

As to paragraph 1, 2, and 3 of this Court's injunction, the Court will allow defendants temporary interaction with vehicles entering and exiting the Dayton Women's Health Center in limited situations. Specifically, if a vehicle stops of its own volition to receive a piece of literature from a picketer or to say

something briefly to a picketer, this would be permissible under the Court's order. If, however, that evolves into a situation where acceptance of literature or conversation continues for a period of time such that other vehicles cannot enter or leave the Dayton Women's Health Center, this would result in a violation of paragraphs 1, 2, or 3 of this Court's injunction.

Before this Court are two sets of plaintiffs' motions for contempt. The first set of motions, filed on September 19, 1988, were continued by this Court by agreement of the parties on October 26, 1988. (*See* this Court's oral decision rendered on October 26, 1988, and subsequently journalized on December 20, 1988.) The Court and the parties agreed at that time to await a ruling from the Court of Appeals before undertaking a review of the contempt motions. Plaintiffs' second set of contempt motions were filed on January 20, 1989, and combined with those motions filed on September 19, 1988. This Court received evidence on the contempt motions on February 9, 10, 13, 14 and 15.

The Court, pursuant to Rule 52 of the Ohio Rules of Civil Procedure, and after careful review of all the evidence presented, makes the following findings of fact and conclusions of law:

I. The following nineteen defendants are before this Court pursuant to lawful notice of plaintiffs' charges of contempt:

> David Mehaffie, Kym Mehaffie, James Mehaffie, Tammy Silvey, Corina Sumner, Mindy Berry, Bruce Moore, Fred Perkins, Douglas Sapp, Marty Delane, Joseph McQueen, Dawn Thomas, Ron Severt, Mark Berry, Lori Delane, David Enix, Cheryl Sorrell, Mary Gigandet and Renate Shroyer.

By agreement between the parties and the Court, Renate Shroyer's case was bifurcated and will be heard at a later date.

II. Plaintiffs have adequately notified each defendant of the nature of the contempt charges and each defendant had ample opportunity to respond to these charges. Each defendant was adequately represented by counsel, and at no time has any defendant objected to such notice, other than in regard to whether such notice was civil or criminal in nature. Lastly, defendants have presented no evidence regarding prior notice.

III. Plaintiffs' motions for contempt were filed in good faith and , contrary to defendants' contentions, were not frivolous. The Court therefore overrules defendants' motions to dismiss plaintiffs' motions for contempt and for sanctions.

IV. Plaintiffs have withdrawn all motions for contempt relating to any oral communications with the staff of the Dayton Women's Health Center.

V. Plaintiffs have withdrawn all contempt motions relating to claims of blocking the driveway of the Dayton Women's Health Center.

VI. Although a number of claimed violations involved defendants placing themselves at a point south of the northern side of the south driveway, the Court finds that all such incidents occurred prior to this Court's oral clarification of October 26, 1988, and, therefore, the Court finds none of the defendants in this regard intended to violate the Court's original order.

VII. This Court's original order regarding place restrictions is reaffirmed, to wit: the sidewalk directly in front of the clinic between the south side of the north driveway and the north side of the south driveway. Picketing at locations on the adjacent north, south or back sides of the clinic within viewing distance of the Dayton Women's Health Center is prohibited.

VIII. This Court's original numbers limitation as contained in Paragraph 12, which is renumbered as Paragraph 11, is affirmed. The Court finds it necessary to further amend its original order and oral statement of October 26, 1988,

attempting to allow for defendants with small children to exercise their right to demonstrate by not including children in strollers, etc., toward the limitations. Henceforth, any time a child leaves either a stroller, etc., or the arms of the demonstrator, within the area designated by the Court for picketing, then at that moment the child will be counted against the numbers limitations. The fact that the child returns to the arms of the demonstrator or to a stroller, etc. will make no difference.

IX. On numerous occasions, a number of defendants have engaged in the blowing of their automobile horns in close proximity to the clinic in a manner that clearly exceeds the spirit of this Court's order in regard to noise volume restrictions. The Court specifically refers to the testimony of defendants, David Mehaffie and Douglas Sapp, who proudly, if not sarcastically, acknowledged that the blew their car horns on multiple occasions. The offered no excuse for their actions, since horn blowing was not specifically prohibited by this Court's injunction. Such conduct may not have violated the precise letter of the Court's injunction, but it clearly violated the spirit of the injunction. To that end, this Court will not hold defendants in contempt of court for such horn blowing. However, Paragraph 5 has been modified, by deleting the word "verbally" and substituting the word "mechanically," in order to prevent such conduct in the future.

X. The Court finds that the following defendants engaged in picketing at locations other than the area designated by this Court's permanent injunction. The Court finds that on each of these occasions a direct violation of the Court's order has occurred. The following specific conduct was in violation of this Court's order:

1. Tammy Silvey, on September 13, 1988, was picketing at the back door of the Dayton Women's Health Center building, by the back door, in violation of this Court's injunction. Tammy Silvey, on October 7, 1988 and December 6, 1988, was picketing by a

dumpster in the back of the Dayton Women's Health Center building in violation of this Court's injunction. Tammy Silvey, on January 13, 1989, was picketing at the southwest side of the Dayton Women's Health Center in violation of this Court's injunction. Tammy Silvey, on January 17, 1989, was picketing in the parking lot in back of the Dayton Women's Health Center in violation of this Court's injunction. These violations constitute place violations.

The court fines Tammy Silvey $500 for each of her violations.

2. Corina Sumner, on September 13, 198, was picketing at the back of the Dayton Women's Health Center building, by the back door, in violation of this Court's injunction. Corina Sumner, on October 7, 1988, was picketing by a dumpster in the back of the Dayton Women's Health Center building in violation of this Court's injunction. These violations constitute trespassing and place violations.

The Court fines Corina Sumner $500 for each of her violations.

3. Mindy Berry, on December 13, 1988, was picketing behind the Dayton Women's Health Center building in violation of this Court's injunction. This violation constitutes a place violation.

The Court fines Mindy Berry $500 for her violation.

The above fines assessed against defendants Tammy Silvey, Corina Sumner, and Mindy Berry are suspended upon the condition that these defendants comply henceforth with this Court's orders.

XI. The Court finds that the following conduct was in violation of the Court's order:

1. The following defendants, to wit: David Mehaffie, Kym Mehaffie, James Mehaffie, Mindy Berry, Dawn Thomas, Corina Sumner, Bruce Moore, Tammy Silvey, Lori Delane, and Mary Gigandet, directly participated in mass picketing by over two hundred people at the clinic site on December 9, 1988. The Court specifically rejects defendant David Mehaffie's explanation as to why he felt justified in participating in the December 9, 1988 demonstrations. None of the other defendants offered any evidence justifying their participation in the demonstration. This demonstration exceeded the numbers limitation set by this Court's injunction.

The Court fines the above defendants $500 each for their participation in the mass demonstration.

The above fines assessed against defendants are suspended upon the condition that they comply henceforth with the Court's orders.

XII. The Court finds that with regard to the mass picketing at the clinic site on February 10, 1989, no specific charges are before this Court claiming defendants violated the Court's order on that date.

XIII. There was conflicting testimony regarding the involvement of David Mehaffie, James Mehaffie, Kym Mehaffie and Dawn Thomas in organizing, soliciting, and/or inducing third parties to participate in the mass picketing that occurred at the clinic site on December 9, 1988. The Court, while reaffirming the fact that it is a violation of this Court's order to organize, solicit and/or induce third parties to participate in mass picketing within viewing distance of plaintiff's clinic, finds that the evidence is insufficient to establish violations in regard to the December 9th demonstration.

XIV. The Court finds that the plaintiffs are entitled to receive reimbursement for attorney fees from respective

defendants found to have violated the Court's orders. The Court will set those issues for hearing at a later date.

XV. As to plaintiffs; remaining allegations of contempt, the Court finds the evidence is insufficient to establish violations of this Court's injunction.

XVI. The evidence received by this Court reaffirms the need for and the propriety of this Court's original injunctive order. That order has been reviewed and affirmed in all respects except as previously noted by the Court of Appeals and this Court's subsequent modifications.

Counsel for the parties having submitted this matter to the Court on the evidence presented at the various hearings thus far held, is ORDERED that the individual defendants and the defendant class previously certified by the Court and consisting of all individuals protesting the activities conducted at Dayton Women's Health Center, 3560 South Dixie Drive, Dayton, Ohio, who have been personally served with this Decision, Entry, and Order, as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the Entry and Order of Final Judgment or this Court's Entry and Preliminary Injunction of January 25, 1987, be and they hereby are permanently enjoined from:

1. Blocking or interfering with he access or egress of any individual going to or from the Dayton Women's Health Center;
2. Blocking or interfering with the driveway of the Dayton Women's Health Center;
3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;
4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety signs, i.e., stop signs, or using any sign urging motorists to honk their horns, including hand and arm signals;

5. Speaking, chanting, yelling or mechanically communicating in any manner designed or intended to reach the staff or patients or volunteers inside the Dayton Women's Health Center, or in such a manner that it is reasonably apparent that the communications are likely to be heard by the staff or patients or volunteers inside the Dayton Women's Health Center.
6 Trespassing on the property of the Dayton Women's Health Center;
7. Picketing in any form, including parking, parading, or demonstrating, which is limited to the homes of patients, employees, staff, or volunteers or the Dayton Women's Health Center or the physicians performing services at the Dayton Women's Health Center;
8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at the Dayton Women's Health Center in groups of more than five individuals;
9. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within viewing of the Dayton Women's Health Center;
10. Picketing in any form including parking, parading, or demonstrating within the viewing distance of the Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility; more specifically, between the south side of the driveway just north of the clinic building and the north side of the driveway just south of the clinic building.
11. Picketing in any form including parking, parading or demonstrating within the viewing distance of the Dayton Women's Health Center in groups of more than ten (10) individuals.
12. For purposes of this injunction, the term "picketing" includes, but is not limited to, parading parking or

any other form of demonstration. In fact, "picketing" goes to the mere presence of an individual.

It is further ORDERED that members may be added to the defendant class by effecting service of a copy of this Order on individuals falling within the description of the defendant class by the Sheriff of Montgomery County, any other law enforcement individual or by any employee of the Dayton Women's Health Center.

The individual effecting such service shall thereafter file in this action a signed Certificate of Service stating the date, time and place of service together with the name and address of the individual upon whom such service was made.

All individuals who are members of the defendant class shall divulge to the individual effecting such service the name and address of any individual upon whom such service is effected, to the extent such information is known. If the name and address of the individual upon whom such service is effected is not known at the time of service, a photograph of video recording of the individual may be attached to the Certificate of Service in lieu of such information. Any employee of the Dayton Women's Health Center or any law enforcement agency authorized by the Court is hereby authorized to photograph the effecting of such service.

Many of the defendants have, by their words and actions, displayed disrespect for the Court's orders. This Court's initial injunction attempted to create a framework within which both parties could exercise their constitutionally protected rights. Defendants, while proclaiming their right to unfettered First Amendment protection, have disregarded plaintiffs' constitutional rights. This Court will continue to make every effort to insure that everyone who would be included in this Court's orders are fairly notified of what is expected of them and given ample opportunity to avoid being charged with an offense. Lastly, future violations will be viewed both criminally and civilly.

In conclusion, this Court finds that in order to properly supervise the orders of this Court and insure the protection of the rights of all parties to this lawsuit, it is necessary to appoint the Montgomery County Sheriff as this Court's eyes and ears at the site of the controversy.

Therefore, the Court will order the Montgomery County Sheriff to make available to the Court all necessary personnel and equipment for the purpose of enforcing this Court's permanent injunction. The Court will, by separate entry, provide detailed instructions to the Montgomery County Sheriff and/or his designees governing their supervision of this Court's permanent injunction. The Court will also reserve the right to from time to time amend and/or add to or delete from these instructions.

SO ORDERED:

_____

John M. Meagher, Judge

A copy of the foregoing Decision, entry and Order has been served upon all parties as listed below this date of filing:

DAVID C. GREER and JOHN F. HAVILAND, Attorneys for Plaintiffs

THOMAS E. GROSSMAN and ROBERT HUFFMAN, Attorneys for Defendants

IN THE COMMON PLEASE COURT OF
MONTGOMERY COUNTY, OHIO
Civil Division

THE DAYTON WOMEN'S HEALTH CENTER, et al., Plaintiffs	:	CASE NO. 86-3120 (Judge John M. Meagher)
v.	:	
DAVID ENIX, et al., Defendants	:	DECISION, ENTRY AND ORDER SUSTAINING THE PLAINTIFFS' MOTION FOR CONTEMPT

This matter came to be heard on plaintiffs' motion for an order for Tammy Silvey to show cause why she should not be held in contempt of court and request for attorney fees. Evidence was taken by the Court on plaintiff's motion on June 2, 1989. After considering the evidence presented to the Court, and the arguments of counsel, the Court finds the plaintiffs' motion for contempt to be well taken. The Court finds that on April 25, 1989, the defendant Tammy Silvey engaged in picketing at locations other than the area designated by this Court's permanent injunction. The Court finds that defendant Tammy Silvey's conduct was a direct violation of the Court's order.

The Court hereby fines Tammy Silvey $500 for her violation of this Court's permanent injunction on April 25, 1989. Further, since the defendant Tammy Silvey has on previous occasions been found to have engaged in conduct in violation of this Court's permanent injunction, the Court further ORDERS the defendant Tammy Silvey to pay $500 fines previously imposed and suspended by this Court's Decision, Entry, and Order of March 14, 1989, at which time the defendant, Tammy Silvey, was found to have engaged in numerous acts of conduct in violation of this Court's order.

The Court further finds that the plaintiffs are entitled to receive reimbursement for attorney fees incurred due to the defendant Tammy Silvey's violation of the Court's order. Counsel for the plaintiffs is ORDERED to submit their statement for fees forthwith.

The fines assessed against defendant Tammy Silvey shall be paid to the Montgomery County Common Pleas Court by 4:30 p.m. on June 9, 1989.

It is SO ORDERED.

_____

The Honorable John M. Meagher

A copy of the foregoing Decision, Entry, and Order has been served upon all parties as listed below this date of filing:

DAVID C. GREER and JOHN F. HAVILAND, Attorneys for Plaintiffs

THOMAS E. GROSSMAN and ROBERT J. HUFFMAN, Attorneys for Defendants

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

DAYTON'S WOMEN HEALTH CENTER, et al.	:	CASE NO. 11545, 11637, 11685
Plaintiffs-Appellees [*sic*]	:	C.P. NO. 86-3120
vs.	:	
DAVID ENIX, et al.	:	
Defendants-Appellants	:	

.....

OPINION

Oral argument heard on the 10th day of June, 1991.
Rendered on the 27th day of August, 1991.

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PER CURIAM

This matter, which comes before us for a second time, is a consolidation of three appeals: Case Nos. 11545, 11637, and 11685. Before addressing the specific issues in each individual case, we will briefly restate the procedural and factual history of the entire matter.

I
PROCEDURAL AND FACTUAL POSTURE

In October, 1986, Plaintiffs-Appellees Dayton Women's Health Center, Inc., K.W. Davis, M.D., and Robert Skipton, M.D., (hereinafter collectively referred to as "DWHC"), filed a complaint against Defendants-Appellants David Enix, Jim Mehaffie, David Mehaffie, Kym Mehaffie, Douglas Sapp, H. F. Perkins, and other unidentified persons. DWHC alleged that the defendants had engaged in tortious activity that interfered with the delivery of medical services at the health center. The prayer of the complaint was for damages and injunctive relief. The complaint also sought to have the case certified as a defendant class action.

In January, 1987, the trial court certified the case as a defendant class action and issued a preliminary injunction. The defendant class was defined as "all individuals protesting the activities conducted at the [health center], who have been personally served ***" with the trial court's entry.

Despite the preliminary injunction, the defendants continued to engage in activities that violated the letter and spirit of the court's order. Accordingly, in response to the defendants' conduct, the trial court supplemented and modified its original injunctive order. Finally, in July, 1987, the trial court issued a permanent injunction enjoining the defendant class from:

> 1. Blocking or interfering with the access or egress of any individual going to or from The Dayton's Women's Health Center;

2. Blocking or interfering with the driveway of The Dayton Women's Health Center;
3. Blocking or interfering with the flow of traffic on, from or to South Dixie Drive;
4. Using any sign larger than four feet in any dimension, including signs resembling traffic safety sign, i.e., stop signs, or using any sign urging motorists to honk;
5. Speaking, chanting, yelling or verbally communicating in any manner designed, intended or having the effect of reaching the staff or patients or volunteers inside The Dayton Women's Health Center;
6. Trespassing on the property of The Dayton Women's Health Center;
7. Verbal communications, either in person or by telephone, with employees, staff or volunteers of the Center unless such communications are with the consent of such employees, staff or volunteers;
8. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center or of physicians performing services at The Dayton Women's Health Center;
9. Picketing in any form including parking, parading or demonstrating at or within the viewing distance of the offices of physicians performing services at The Dayton Women's Health Center in groups of more than five individuals;
10. Picketing in any form including parking, parading or demonstrating on the west side of South Dixie Drive within viewing of The Dayton Women's Health Center;
11. Picketing in any form including parking, parading, or demonstrating within the

viewing distance of The Dayton Women's Health Center at any location other than the sidewalk bordering the east side of Dixie Drive in front of the facility;

12. Picketing in any form including parking, parading, or demonstrating within the viewing distance of The Dayton Women's Health Center in groups of more than ten (10) individuals.

The defendants appealed from the trial court's order. On December 5, 1988, we rendered an opinion in which we affirmed virtually all of the court's permanent injunction and determined that the defendants waived their right to challenge the class certification order for failure to file a timely appeal. However, we did strike from the injunction paragraphs numbered 7 and 8 concerning verbal communications with health center employees and residential picketing, respectively. We also modified paragraph 5 dealing with the acceptable noise level of demonstrations carried on at the clinic. The defendants filed a motion for reconsideration, which we denied on January 6, 1989.

A notice of appeal was subsequently filed, along with a motion to certify the case based upon five alleged conflicts with other appellate districts. We found that we were in conflict on only one issue, that being the appealability of the class certification order. Accordingly, we ordered that the record in the case be certified to the Supreme Court for review and determination.

In their brief to the Supreme Court, the defendants argued several propositions of law related to the "range and extent of the permanent injunction." However, the Court chose only to address only the sole question certified to it. On June 20, 1990, the court affirmed our decision and held that an order of a trial court, pursuant to Civ. R. 23(C), is a final appealable order from which a party must appeal within thirty days. Dayton Women's Health Center v. Enix (1990), 52 Ohio St.3d 67, reh'g denied 53 Ohio St. 3d 706, cert. denied sub nom Enix v. Dayton Women's Health Center (1991), _____ U.S. _____.

While the appeal from our decision of December 5, 1988, was pending, contempt charges were brought against the defendants in each of the three appeals now before us. The facts of each case are as follows:

A. CASE NO. 11545

In this case, over 200 contempt citations were filed against eighteen defendants for allegedly violating various provisions of the permanent injunction. From February 9 to February 15, 1989, the citations were tried. On March 14, 1989, the trial court found that ten of the eighteen defendants were in contempt on seventeen of the citations. The remaining citations were dismissed for lack of sufficient evidence to establish that actual violations of the order had occurred. The defendants who were found to be in contempt were fined $500 for each violation of the order. The fines were then suspended upon the condition that the defendants "comply henceforth with the Court's orders."

In addition to addressing the specific contempt charges in its judgment, the trial court renewed its restriction on residential picketing. The order prohibited "[p]icketing in any form including parking, parading or demonstrating which is limited to the homes of patients, employees, staff or volunteers of The Dayton Women's Health Center of the physicians performing services at The Dayton Women's Health Center." (Emphasis ours). The trial court also rejected the defendants' claim that the vast majority of the contempt citations were frivolous.

B. CASE NO. 116376

In this case, a contempt citation was filed against defendant Tammy Silvey, who is also a defendant in Case No. 11545, for allegedly violating the provision in the permanent injunction which limits picketing to a small strip of sidewalk on the east side of South Dixie Drive in front of the health center. On April 25, 1989, while picketing at the clinic, Silvey allegedly left the sidewalk, approached an automobile turning into the clinics'

driveway, and followed the car about thirty-five or forty feet onto another building's parking lot. After a hearing on the merits, the trial court found that Silvey had "engaged in picketing at locations other than the area designated by [the] * * * permanent injunction", and that such conduct was in direct violation of the order. Silvey was fined $500 for the April, 1989, violation of the permanent injunction, and was also ordered to pay $500 in fines previously imposed and suspended by the trial court.

C. CASE NO. 11685

In this appeal, contempt charges were brought against twenty-two defendants for trespassing at The Dayton Women's Health Center on March 24, 1989. These defendants were not involved in the original class action and were alleged to have been unaware of the permanent injunction. However, all twenty-two defendants received a copy of the court's order when they arrived at the clinic, and they were also given oral notice by sheriff's deputies that they were trespassing on the health center's property in violation of the court order.

The defendants were given approximately two hours to read the order and comply with its requirements. They refused to obey. As a result, the defendants were arrested and charged with criminal trespass. They were then taken to Kettering Municipal Court where they entered pleas of no contest and were convicted and sentenced accordingly.

subsequent to the criminal trespass proceedings in Kettering, a hearing was held in Montgomery County Common Pleas Court on the contempt charges. Based upon the evidence present, the trial court found that the defendants had violated its order by trespassing on the clinic's property. The court then imposed a $1,000 fine on each defendant, $500 of which was suspended "on the condition that each defendant comply henceforth" with the provisions of the permanent injunction.

II
ISSUES PRESENTED FOR REVIEW

In each of the cases now before us several issues have been presented for review. We will address each case individually.

A. CASE NO. 11545

In this case the defendants have raised fifty-three assignments of error. Many of the arguments pertain tot similar issues and will therefore be consolidated. Other arguments will be addressed individually.

1. Class Certification

In assignments of error one through four, six through seven, sixteen through twenty-seven, and twenty-eight through thirty-three, the defendants (1) challenge the trial court's order certifying this matter as a class action and (2) argue that they cannot be bound by an injunction limiting or prohibiting unlawful activity by a class of which they were not a member when the injunction issued.

As to the first argument, we held in our decision of December 5, 1988, that the failure of these defendants to raise the issue of certification within thirty days of the trial court's order waived their right to challenge the court's order of certification. That judgment has been affirmed on appeal and is now the "law of the case". *Nolan v. Nolan* (1984), 11 Ohio St. 3d, 1. *Weaver v. Motorist's Mutual Insurance Co.* (October 4, 1990), Montgomery App. No. 11676, unreported. The certification may not now be questioned.

Appellants' second argument is without merit. The court acted on its inherent power to preserve the effect of its orders and to protect the rights determined therein from intentional interference by other persons. .*S. v. Hall* (5th Cir., 1962), 474 F. 2d 261. This power extends to persons who were not before the court when it made its prior order but who, after notice of the order, act in violation of its terms and restrictions. *Planned Parenthood v. Project Jericho* (1990), 52 Ohio St. 3d 56. The

court has the power to punish such acts as contempt. *Id.* Appellants" reliance on *NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886, is misplaced: The court's order does not impose liability on members of a class or by reason of mere association. Any liability arises after individual notice and violation of the order. Lastly, the order is not "content" bases and thus does not violate the First Amendment precepts of *Carey v. Brown* (1980), 447 U.S. 455 and *Police Department of Chicago v. Mosley* (1972), 408 U.S. 92.

Based upon the foregoing, the defendants' First through Fourth, Sixth and Seventh, Sixteenth through Twenty-Seventh, and Twenty-Eighth through Thirty-Third Assignments of Error are overruled.

2. Provisions of Permanent Injunction

In six of their Assignment of Error, specifically, assignments numbered nine through ten and twelve through fifteen, the defendants assert that the trial court's permanent injunction, as drafted, is vague, overbroad, and improper. Essentially, the defendants contend that the prohibition contained within the injunction are not reasonable time, place, and manner restrictions. We disagree. We have already determined that, with the exception of the trial court's complete ban on residential picketing and verbal communications with health center personnel, the trial court's order contained content-neutral time, place, and manner restrictions. Because the Ohio Supreme Court denied *cert.* as to this issue, our prior determination remain the "law of the case" and will not be reexamined. *Nolan v. Nolan, supra; Weaver v. Motorists Mutual Insurance Co., supra.*

Accordingly, the defendants' Ninth and Tenth, and Twelfth through Fifteenth Assignments of Error are overruled.

3. Residential Picketing

In their Eleventh Assignment of Error, the defendants contend that the trial court erred by renewing its restriction on residential picketing, at paragraph eight of its Order. That restriction is limited to picketing focused on specific residences. It does not ban picketing throughout residential area. It does

not prohibit residential anti-abortion picketing while permitting residential picketing having other aims. Therefore, the order is content-neutral and sufficiently narrow to protect the interests of those who are presumptively unwilling to receive this form of speech and have the right not to, while leaving open ample alternative channels of communication. It is not in violation of the rights of these defendants protected by the First Amendment. See, *Perry Education Assn. v. Perry Local Educators' Assn.* (1983), 460 U.S. 37, 103 S. Ct. 948, 74 L.Ed. 2d 794; *Frisby v. Schultz* (1988), ___U.S.___, 108 S. Ct. 2495.

Accordingly, the defendant's Eleventh Assignment of Error is overruled.

4. Equal Protection

In Assignments of Error five and eight, the defendants assert that the permanent injunction violates the equal protection clause of the Fourteenth Amendment because the "only type of picketer enjoined is one who protests what [the health center] does." Again, we disagree, and for the same reason enunciated in Sections II A 1 and II A 2 of this opinion.

In our opinion dated December 5, 1988, we addressed the equal protection argument and held that the permanent injunction was not constitutionally infirm for the same reason presented here. Because the Ohio Supreme Court decided not to address this issue, our holding has become the "law of the case." *Nolan v. Nolan, supra; Weaver v. Motorists Mutual Insurance Co., supra.*

The defendants' Fifth and Eighth Assignments of Error are overruled.

5. Contempt Citations Frivolous

Defendants argue in Assignments thirty-four through forty-seven that the vast majority of contempt citations filed against them were frivolous and that the trial court, instead, should have imposed sanctions against DWHC for bringing such actions. We disagree.

Our review of the record indicates that although many of the contempt charges filed by DWHC were for less than "gross" violations of the injunction, the defendants have now shown that

those charges were baseless. Based upon our review of the record, we cannot conclude that it was an abuse of discretion to impose sanction on the defendants. If anything, it appears to us that the trial court has handled this case fairly and attentively in light of the sheer magnitude of documents and testimony that it has had to analyze and rule upon. Defendants have failed to portray error.

Based upon the foregoing, defendants' Thirty-Fourth through Forty-Seventh Assignments of Error are overruled.

6. Contempt Charges Relating to Defendant Tammy Silvey

Assignments of Error forty-eight through fifty-three deal exclusively with defendant Tammy Silvey. In these assignments, the defendants essentially contend that:
(1) the trial court erred in finding Silvey in contempt of its order when the provisions of that order were invalid and when Silvey had not been served with a copy of the order;
(2) the trial court erred in finding Silvey in contempt when it was shown that DWHC proceeded with "unclean hands"; and (3) Silvey should not have been found in contempt for activities at the health center on April 25, 1989.

With regard to the arguments concerning the validity of the injunction and DWHC's "unclean hands", we have already determined, in our analysis of assignments numbered nine through fifteen and thirty-four through forty-seven, that the provisions for the underlying order are not invalid and that DWHC has not violated "good faith". Accordingly, defendants' arguments on these points are without merit.

Likewise, defendants' argument regarding Silvey's notice of the court's order is meritless. In her brief in Case No. 11637, Silvey notes that the parties stipulated before the trial court that she had received notice of the injunctive order.

Finally, with regard to the defendants' argument that Silvey did not violate the permanent injunction on April 25, 1989, our review of the record indicates that Silvey trespassed on property adjoining the health center. Clearly, this is a violation of the injunctive order, and it was not an abuse of discretion for the trial court to find Silvey in contempt for such activities.

The defendants' Forty-Eighth through Fifty-Third Assignments of Error are overruled.

B. CASE NO. 11637

This case involves only one defendant, Tammy Silvery, and only one issue, whether the trial court erred in finding Silvey in contempt for her activities at the health center on April 25, 1989.

Essentially, Silvey contends that because her actions only amounted to a technical infraction of the court's order, and because she did not actually intend to violated the order, it was error the trial court to find her in contempt. We do not find these arguments persuasive.

As noted in Section II A 6 of this opinion, the trial court found that Silvey deliberately left the area where picketing was permitted and trespassed upon an adjoining landowner's parking lot. Our review of the trial transcript indicates that the court's decision was supported by competent and credible evidence. Therefore, in light of the fact that Silvey's actions were violative of the permanent injunction, it was not error for the trial court to hold her in contempt and fine her accordingly.

Silvey's sole Assignment of Error is overruled.

C. CASE NO. 11685

The twenty-two defendants in this case raise five assignments of error.

1. Double Jeopardy

In their first assignment, the defendants contend that the trial court violated the double jeopardy clause of the U.S. Constitution by finding them in contempt for trespassing at the health center after they had been charged

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under two criminal statutes or impose successive criminal punishments for the same act or transaction. *Blockburger v. United States* (1932), 284 U.S. 299. A subsequent prosecution is

barred if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted and convicted. *Grady v. Corbin* (1990), ___ U.S. ___, 110 S.Ct. 2084.

In the case before us the defendants were charged and convicted in Kettering, Ohio, under its criminal trespass ordinance for activities carried our DWHC on March 24, 1989. subsequent to those proceedings, contempt charges alleging a violation of the trial court's permanent injunction based on and for the same acts were filed in the Court of Common Pleas Against those same persons.

After a hearing on the merits, the trial court found that the defendants had trespass upon the health center's property and were in contempt of its injunctive order. The court fined each of the defendants $1,000, but suspended $500 of the fine on the condition that the defendants comply with the order in the future. The court characterized the remaining $500 fine as a civil penalty and dismissed defense counsel's argument that the court was actually imposing a successive criminal penalty upon the defendants in violation of their double jeopardy rights.

"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Bloom v. Illinois* (1968), 391 U.S. 194, 201, 20 L.Ed. 2d 522, 528. Fundamental constitutional safeguards required in criminal trials are also required in criminal contempt proceedings. *State v. Kilbane* (1980), 61 Ohio St. 2d 201. *Brown v. Executive 200, Inc.* (1980), 64 Ohio St. 2d 250. Therefore, double jeopardy protections apply to any contempt which is determined to be criminal.

Whether a contempt is civil or criminal depends largely on the character of the sanction imposed. If it is for civil contempt the punishment is remedial and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. *Gompers v. Bucks Stove Range Co.* (1911), 221 U.S. 418, 441, 55 L.Ed.797, 806. Sanctions for criminal contempt thus share three traditional characteristics: (1) the sanction is a punishment; (2) the sanction is imposed for conduct that has occurred in the past; and (3) the

purpose of the sanction is to uphold the authority of the court. Civil contempt produces a remedial sanction, which is one intended to coerce the termination of specific misconduct which constitutes a continuing contempt of court.*

> If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period."
>
> * * *
>
> If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

Hicks v. Feiock (1988), 485 U.S. 624, 632, 99 L.Ed. 2d 721, 731, citing *Gompers v. Bucks Stove, supra*, 221 U.S., at 442.

The $500 fine imposed on these Appellants constituted a punishment for past conduct imposed for the purpose of upholding the authority of the court. The fine was payable to the court. The Appellants could not avoid paying the fine by performing an affirmative act. The sanction was, therefore, punitive. It could not be imposed for the same conduct which supported Appellant's prior conviction for criminal trespass, for to do so placed Appellant's in jeopardy twice. *Grady v. Corbin*, *supra*.

We conclude that an essential element of the charge of contempt brought against Appellants required proof of conduct which constituted the offense of criminal trespass for which they had previously been prosecuted an convicted. The portion of their punishment which constitutes a criminal penalty is,

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*See, Martineau, Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt (1981), 50 Cin. L. Rev. 677, at 693-4.

therefore, barred by double jeopardy. The portion of the fine in the amount of $500 ordered suspended was, in contrast, a civil penalty, not because it was suspended but because it was imposed to coerce certain behavior an can be avoided by Appellants by compliance with the court's order. It was purely "remedial" and thus did not put Appellants in jeopardy of criminal proceedings or criminal punishment twice.

Based on the foregoing, the Appellant's First Assignment of Error is sustained.

2. Personal Jurisdiction/Class Certification

In their Second and Third Assignments of Error, the defendants essentially argue that the trial court erred be improperly including them in the defendant class and finding them in contempt of the permanent injunction. These arguments are not persuasive.

We conclude that in looking at the peculiar facts of this appeal class certification is not at issue. The evidence indicates that after the defendants' arrival at the health center each was served with a copy of the court's order and were informed by the deputies that their actions were in violation of that order. Had it not been a violation of the double jeopardy clause to do so, the trial court could have found each defendant in contempt of its order for their individual acts.

The defendants' Second and Third Assignments of Error are overruled.

3. Clarity of Order

Defendants argue in their Fourth Assignment that the trial court erred in enforcing an order that was "vague, overbroad, and beyond the comprehension of persons of ordinary intelligence." Based upon the record before us, we do not agree.

There is ample evidence in the record to indicate that all of the defendants were served with the order and that the deputies

made them aware of it provisions. The defendants' purported inability to understand the order is not persuasive.

Accordingly, the defendants' Fourth Assignment of Error is overruled.

4. Recusal

In their final assignment, the defendants contend that the trial court erred in not recusing itself after engaging in the prosecutorial act of instituting the contempt charges against them.

First of all, there is no evidence in the record supporting the defendants' contention that the trial court acted as both prosecutor and trier of fact. It was the county prosecutor's office, not the trial judge, that acted as advocate.

Secondly, the defendants have not shown why it was error for the trial court to refuse to recuse itself so that it could enforce its own order. Although there is evidence in the record to indicate that the trial judge reviewed tapes of the defendants' conduct and was involved in meetings with the prosecutors and deputies prior to trial, there is no showing that the trial judge was unable to maintain his objectivity when the contempt charges were brought before him on the merits.

Based upon the foregoing, the defendants' Fifth Assignment of Error is overruled.

III

CONCLUSION

A. CASE NO. 11545

All of their Assignments of Error having overruled, the judgment of the trial court dated March 14, 1989, finding Tammy Silvey, Corina Sumner, Mindy Berry, David Mehaffie, Kym Mehaffie, James Mehaffie, Dawn Thomas, Bruce Moore, Lori Delane, and Mary Gigandet in contempt, will be affirmed.

B. CASE NO. 11637

Tammy Silvey's sole Assignment of Error having been overruled, the judgment of the trial court finding her in contempt and assessing fines will be affirmed.

C. CASE NO. 11685

Their First Assignment of Error having been sustained, the judgment of the trial court finding Virginia A. Bachelier, John V. Bertrand, Elaine V. Deaton, Kathleen M. Dewey, Thomas P. Drake, Geraldine M. Dzikowski, Margaret J. Geis, Robert P. Geis, Kevin S. Gordon, Mark E. Hayden, Constance M. Hurier, Mathew Keck, David B. Leach, Francis Lieuwen, Raymond E. Loebker, James M. Martin, John D. Parker, Estelle Quallen, Robert P. Rust, Marcella L. Tilford, Lewis H. Urling, and Paul F. Weckenbrock in contempt and assessing fines against them, will be ordered modified, and that portion of the penalty in the form of a fine in the amount of $500 not suspended upon further compliance is vacated. The portion of the order concerning the suspended fine in the amount of $500 is affirmed and continued. FAIN, P.J., WOLFF, J., and GRADY, J., concur.

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Honorable John M. Meagher

The Supreme Court of Ohio

1992 TERM

To wit: January 22, 1992

Dayton Women's Health Center, et al., Appellees,	:	Case No. 91-2141
v.	:	
David Enix, et al., Appellants.	:	

Upon consideration of the motion for an order directing the Court of Appeals of Montgomery County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James E. Mahaffey.

(Court of Appeals Nos. 11545 & 11637)

/s/
THOMAS J. MOYER
Chief Justice

Supreme Court, U.S.
FILED
JUN 5 1992
OFFICE OF THE CLERK

(3)

NO. 91-1802

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHERYL SORRELL, MARTY DELANE, JOSEPH McQUEEN, MARK BERRY, RON SEVERT and TAMMY SILVEY,

Petitioners,

v.

THE DAYTON WOMEN'S HEALTH CENTER, INC., K. W. DAVIS, M.D., and ROBERT SKIPTON, M.D.,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court may enter a permanent injunction which places reasonable time, place and manner restrictions on the petitioners' picketing activities which are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.

2. Whether an injunction offends the First Amendment, where the injunction does not enjoin class members from engaging in constitutionally protected activity on private property.

3. Whether an injunction violates the due process rights of absent class members, where the injunction does not preclude the absent class members from asserting unique individual defenses.

4. Whether due process is violated where a class representative's failure to appeal the issue of class certification precludes individual class members from challenging the certification of the defendant class at a later time.

5. Whether the doctrine of prior restraint is violated, where the trial court has tailored the provisions of an injunction according to the testimony and evidence presented.

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NO. 91-1802

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHERYL SORRELL, MARTY DELANE, JOSEPH McQUEEN, MARK BERRY, RON SEVERT and TAMMY SILVEY,

Petitioners,

v.

THE DAYTON WOMEN'S HEALTH CENTER, INC., K. W. DAVIS, M.D., and ROBERT SKIPTON, M.D.,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Petitioners have incorrectly identified the date upon which the Court of Appeals for Montgomery County, Ohio entered its decision. That decision was entered neither on August 21, 1990 nor August 27, 1992. The case was decided on August 27, 1991.

The Petitioners have also erred in stating that the Court of Appeals decision is unreported. The decision is reported at 68 Ohio App.3d 579 (1991), and in Vol. 65, No. 17 Ohio St. Bar Ass'n Rpt. 579 (Apr. 27, 1992).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the First and Fourteenth Amendment issues identified in the Petitioners' writ of certiorari, this case also involves Rule 4(A) of the Ohio Rules of Appellate Procedure, which provides in pertinent part:

RULE 4. APPEAL AS OF RIGHT — WHEN TAKEN

> **(A) Appeals in Civil Cases.** In a civil case, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days of the date of the entry of the judgment or order appealed from.

STATEMENT OF THE CASE

A. Procedural Posture

The long procedural history of this case commenced with the Respondents' filing of a complaint for a preliminary and permanent injunction on October 14, 1986. At that time, the Respondents also moved to have the case certified as a defendant class action.

The Petitioners responded to the allegations contained in the Respondents' complaint and the trial court scheduled an evidentiary hearing on December 4, 1986. On January 15, 1987, following three days of extensive testimony and the filing of post-trial briefs, the trial court certified a defendant class and entered a preliminary injunction.

The Petitioners have selectively quoted that portion of the trial court's order defining the defendant class. The court in fact defined the class to consist of: "All individuals protesting the activities conducted at the Dayton Women's Health Center . . . *who have been personally served* with this Entry and Preliminary Injunction as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them *who receive personal service* of the Entry and Preliminary Injunction. (emphasis added) (Appendix to Petition for Cert., pp. 3-4).

Following the entry of a preliminary injunction, the protesters continued to engage in the type of conduct which necessitated the filing of this lawsuit in the first instance. Their protesting activities spread to the homes of the clinic's physicians and employees. In response to their conduct and after another evidentiary hearing, the trial court supplemented and modified its original injunctive order by adding additional restrictions on the number of permissible protesters and the locations where protesting activity could be conducted. On July 10, 1987, based on the evidence submitted at

the previous evidentiary hearings, the trial court permanently enjoined the defendants and defendant class in accordance with the previous orders of the court. *Dayton Women's Health Cente.* v. *Enix*, Case No. 86-3120 (Montgomery Cty. C.P. July 10, 1987) (Appendix to petition for Cert., p. 13).

An appeal of the permanent injunction was taken to the Court of Appeals of Montgomery County, Ohio. On December 5, 1988, the court affirmed virtually every aspect of the trial court's permanent injunction, with the exception of the restriction prohibiting the members of the defendant class from verbally communicating with employees of the Dayton Women's Health Center without their consent, and the prohibition concerning residential picketing. In addition, the Montgomery County Court of Appeals modified a provision of the permanent injunction relating to the acceptable noise level of the protesters' activities at the clinic. *Dayton Women's Health Center* v. *Enix*, Case No. 10579 (Montgomery Cty. C.A. December 5, 1988) (Appendix to Petition for Cert., p. 19).

The issue of the appealability of a class certification order was certified to the Supreme Court of Ohio for review. The court held that an order certifying a defendant class action is a final appealable order, affirming the decision of the court of appeals. *Dayton Women's Health Center* v. *Enix*, 52 Ohio St. 3d 67, 555 N.E. 2d 956, *reh. den.*, 53 Ohio St. 3d 706, 558 N.E.2d 61 (1990). The defendants in that case filed a Petition for Writ of Certiorari in this Court, and this Court denied the petition. *Enix, et al.* v. *Dayton Women's Health Center, Inc., et al.*, 111 S.Ct. 753 (1991).

While the appeal was pending in the Supreme Court of Ohio, the Respondents brought contempt charges against the Petitioners in this case (among others). On March 14, 1989, the trial court entered its decision sustaining in part and overruling in part the motions for contempt. A second contempt hearing was held on June 2, 1989 concerning the conduct of Petitioner, Tammy Silvey. On June 6, 1989, the trial court entered its decision and found Silvey in contempt.

The Petitioners then appealed the judgments of March 14, 1989 and June 6, 1989. The Second Appellate District of Ohio affirmed the decisions of the trial court on August 27, 1991. The Petitioners filed an application for reconsideration, which the Court of Appeals denied. The Petitioners then filed a motion for the Court of Appeals to certify the record to the Supreme Court of Ohio, contending that the Court of Appeals' decision on six issues conflicted with decisions of other Ohio Appellate districts. This motion was overruled. The Petitioners then filed a memorandum in support of jurisdiction with the Supreme Court of Ohio, which overruled their motion.

B. Statement of Facts

The Dayton Women's Health Center, Inc., is a non-profit corporation providing a full range of reproductive health care services since 1973. While the Center has often been the site of some peaceful picketing activity, the picketing and protesting activity began to escalate in June, 1986. Since that time, the number of picketers progressively increased, the noise level at the clinic rose, and the picket signs have been larger. Picketers began trespassing and putting literature on cars. What began as peaceful picketing ultimately got out of control and the Respondents had no recourse but to file an action for injunctive relief.

The number of protesters at the Dayton Women's Health Center has varied. At times as many as 70 picketers have demonstrated at the clinic. Because of the large number of protesters, it was impractical to join everyone as individual defendants; therefore, the case was submitted to the trial court as a defendant class action. The named defendants were representatives of the defendant class and their conduct at the clinic represented the type of conduct exhibited by all class members whom the Respondents sought to enjoin.

The record in this case is replete with testimony that the named defendants formed the core group of protesters, with

the other class members acting in concert and cooperation with them. After the court issued its preliminary injunction, certified the defendant class, and established a procedure for adding additional class members, two of the class representatives, David Mehaffie and H. F. Perkins, instructed the picketers that they need not accept service of the injunction when attempts were made to serve them.

The voluminous transcript in this case graphically demonstrates instances of intimidating and harassing conduct directed at the Center's employees and patients by the named defendants and the defendant class. The picketers have caused traffic problems, regularly trespassed on the property of the Center, and routinely blocked the Center's ingress and egress. Their conduct forced the facility to close on at least three occasions. On a daily basis the picketers have subjected the patients and staff of the clinic to verbal harassment, threats, and intimidation. The abusive, threatening, and intimidating nature of the defendants' conduct has been alarming and frightening to the clinic's staff and patients. The constant and chronic screaming and chanting by the defendants is so loud that it can be heard inside the facility.

Not surprisingly, the defendants' abusive, harassing, and intimidating conduct has caused the Dayton Women's Health Center and the physicians to lose patients. Moreover, the clinic has had difficulty hiring medical personnel to provide health care at the facility. The conduct of the picketers has been so extreme that one of the clinic's physicians left his practice at the clinic.

The instances of coercion, harassment, and intimidation inflicted by the defendant class members upon the employees and patients of the Dayton Women's Health Center are well documented in the 814-page trial transcript. Their activities have adversely affected the physical well being of the patients of the clinic and have irreparably harmed the lawful business conducted at the clinic. It was based on those facts that the case was presented to the trial court on the plaintiffs' motion for a preliminary and permanent injunction, and that the

permanent injunction, as set forth above, was entered by the trial court.

Following the Court of Appeals' decision rendered on December 5, 1988, which substantially affirmed the decision and order of the trial court, the Respondents filed a motion to modify the permanent injunction. The court's order of March 14, 1989, in addition to affirming in part and overruling in part the Respondents' contempt motions, modified paragraph seven of the permanent injunction to make it consistent with the Court of Appeals' decision.

Although the Petitioners herein were not named defendants in the original litigation, they were each personally served with a copy of the injunction. This is how they became members of the defendant class. Contrary to the Petitioners' contention, the trial court did not enjoin the Petitioners from engaging in lawful activity. The Petitioners were simply served with the same injunction that had been issued to all other members of the defendant class who had been protesting the activities conducted at the Dayton Women's Health Center. Likewise, Petitioner Tammy Silvey was served with a copy of the same injunction that was served upon all of the other protesters. Clearly, none of the Petitioners have been singled out. All of the protesters picketing the activities at the Dayton Women's Health Center have been personally served with the same injunction and the provisions of the injunction have been enforced against all protesters in an even-handed fashion.

SUMMARY OF ARGUMENT

The Petitioners' have stated five reasons for granting the writ. The Petitioners' first and third arguments are essentially identical to the arguments presented in the Petition for Certiorari filed in this court as No. 90-758. The Petitioners have presented no convincing reasons why this court should have to reconsider these issues once again. As to the Petitioners' second argument, the federal case upon which they rely is easily distinguished from the instant case, and the factual basis of the Petitioners' overbreadth theory is unsound. This court need not reach the due process issue posed in the Petitioners' fourth argument, since the Supreme Court of Ohio disposed of this issue on a purely procedural basis. As to their fifth argument, the Petitioners are attempting to assert this argument for the first time in this court, and so the argument need not be considered on this basis alone.

ARGUMENT

I.

The permanent injunction does not offend the First Amendment guarantees of free speech and free assembly, because the provisions of the injunction are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.

The Petitioners' first argument is taken verbatim from their petition filed previously. (Petition for Cert. No. 90-758, p. 11) This Court saw fit not to grant certiorari then, and there is no reason to do so now. The cases cited by the Petitioners do not support their argument.

In *Boos* v. *Barry*, this Court addressed the constitutionality of a statute that prohibited certain behavior within 500 feet of any foreign embassy. 485 U.S. 312 (1988). The statute at issue contained a display clause and a congregation clause. The display clause prohibited the display of any sign criticizing the government of a given embassy, where the sign was displayed within 500 feet of the embassy. This Court held that the display clause was unconstitutional. *Id.* at 329. The Court pointed to 18 U.S.C. § 112, which already protected the interest asserted by the government in support of the display clause. *Id.* at 324-329. The congregation clause prohibited more than three people from congregating within 500 feet of an embassy. This Court held that the congregation clause was *not* unconstitutional. Clearly, the display clause was aimed solely at the content of political expression, whereas the congregation clause was aimed at conduct.

The injunction at issue, carefully drafted after days of testimony, is conduct-based, and not content-based. There was simply no other way for the trial court to protect the countervailing interest of the parties, other than by drafting a narrowly-tailored injunction. In terms of providing a public forum for demonstration, the trial court's injunction is less

restrictive than the congregation clause in *Boos*, *supra*, which this Court found not to be constitutionally infirm. In *Boos*, the statute prohibited a congregation of more than three people within 500 feet of an embassy. In the injunction at issue here, the Petitioners are allowed to demonstrate on the front sidewalk of the Dayton Women's Health Center. In this respect, *Boos* actually supports the position of the Respondents.

In *Frisby* v. *Schultz*, the issue concerned the constitutionality of an ordinance, not of an injunction. 487 U.S. 474 (1988). This court held that an ordinance making it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual" is not facially invalid under the First Amendment. Although the Petitioners rely on *Frisby* to support their argument that the ban on residential picketing is overbroad, their reliance is misplaced, because the *Frisby* court declined to address the overbreadth issue.

> Of course, this case presents only a facial challenge to the ordinance. Particular hypo-thetical applications of the ordinance — . . . — may present somewhat different questions. . . . Moreover, since our First Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of applying the ordinance to such hypotheticals remains open to question. These are, however, questions we need not address today in order to dispose of appellee's facial challenge.

487 U.S. at 488.

The scope of the permanent injunction at issue is simply a reflection of the facts introduced into evidence at trial. Notwithstanding their religious and moral convictions, the conduct of the Petitioners went beyond the realm of protected free speech and became an abusive vehicle for harassing, intimidating and coercing the staff, physicians and patients of

the Dayton Women's Health Center. It is precisely this type of abusive conduct which the courts are empowered to enjoin through reasonable time, place and manner restrictions. *Bering* v. *Share*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987); *Parkmed Company* v. *Pro-Life Counseling, Inc.*, 442 N.Y.S. 2d 396, 110 Misc. 2d 369 (Sup. Ct., N.Y. 1981), *modified*, 457 N.Y.S. 2d 27, 91 A.D.2d 551 (App. Div. 1982); *Planned Parenthood Ass'n of Cincinnati, Inc.* v. *Project Jericho*, 52 Ohio St. 3d 56, 556 N.E.2d 157 (1990). All of the restrictions contained in the permanent injunction were designed to control, not eliminate, the Petitioners' conduct, in a manner which would also permit the Dayton Women's Health Center and its patients and employees to engage in constitutionally protected activities. The permanent injunction did not foreclose the Petitioners' rights of speech, but merely restricted their activities in a constitutionally permissible manner.

The injunction is content-neutral and is based on content-neutral findings of fact. The trial court properly refused to restrict the content of the Petitioners' speech. The injunction is narrowly tailored and limits only the number of picketers, the location of picketing, and the manner of their demonstrations. It serves the state's significant interests without unduly limiting the Petitioners' activities. The injunction does not foreclose alternative channels of communication. It allows the Petitioners to convey their beliefs by means of pickets, and allows them to speak with anyone they choose.

II

The injunction does not enjoin class members from engaging in constitutionally protected activity on private property.

To support their second argument, the Petitioners cite a state case and *Frisby* v. *Schultz*, *supra*. The Petitioners have neglected to point out the key distinction between *Frisby* v.

Schultz and the case at bar, which is that *Frisby* involved an ordinance of city-wide application, whereas the instant case involves an injunction narrowly tailored by the trial court after exhaustive testimony and evidence. Herein, any picketer within view of the Dayton Women's Health Center must be considered as a distinct component of the overall harm caused by the mass of picketers and protesters within view of the Dayton Women's Health Center. This is true regardless of whether a picketer has been given express permission to be on private property within view of the Dayton Women's Health Center.

The injunction prohibits picketing. It does not preclude a person aligned politically with the Petitioners from visiting a residence within view of the Dayton Women's Health Center. If such a person were invited to a nearby residence before the person began to protest, then that person would not be bound by the injunction, since the person would not have been served with the injunction. A person cannot be bound before being served with the injunction, and one cannot be served until one begins protesting.

Therefore, the federal case upon which the Petitioners rely is distinguishable from the case at bar, and the factual basis of their overbreadth theory is unsound.

III.

The injunction does not violate the Due Process rights of absent class members.

The Petitioners' third argument is essentially identical to the argument raised in their earlier petition for certiorari. (Petition for Cert., No. 90-758, p. 18) Once again, the Petitioners have presented no convincing reason as to why certiorari should be granted.

The Petitioners rely upon *Mullane* v. *Central Hanover Bank & Trust Co.* as establishing "some important guidance"

in determining what constitutes notice in the context of defendant class actions. 339 U.S. 306 (1950). The Petitioners' reliance upon *Mullane* is misplaced. No injunction was issued in *Mullane*, nor was it a class action case. Even the notice aspect of the case is distinguishable from the instant case. In *Mullane*, notice by publication was provided to the individual investors. *Id.* at 310. Herein, by way of contrast, personal notice of the injunction is required before an absent class member can be bound thereby. "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding." *Id.* at 313. The personal service provided to all members of the defendant class satisfies the requirements of due process, according to the case cited by the Petitioners.

Contrary to the Petitioners' assertion, the injunction does not preclude absent class members from asserting individual defenses, so long as such defenses are unique, and not common defenses of the class. This issue has already been addressed by the Supreme Court of Ohio in *Planned Parenthood Ass'n of Cincinnati, Inc.* v. *Project Jericho*, 52 Ohio St. 3d 56, 556 N.E. 2d 157 (1990).

> [A]bsent class members are not precluded from raising individual defenses . . . . [They] may not, however, attack the validity of the injunction once that issue had been litigated by class representatives.
>
> [A]n absent class member is not precluded from raising a unique defense in a later proceeding.

Id. at 65 (citations omitted).

Although the Petitioners may claim that they did not engage in conduct in violation of the injunction, that is not a unique defense but a common defense. Even through all of the contempt hearings, none of the Petitioners raised a unique defense.

The Petitioners argue that an injunction cannot bind persons "who act independently" of the parties enjoined. First,

the record will show that the Petitioners have not acted independently, but have acted in cooperation with the class representatives in their protesting activities. Second, even assuming the Petitioners have acted independently, a court of equity has the inherent jurisdiction to bind certain nonparties to the provisions of an injunction so as to preserve the rights and duties of the parties to the injunction. *United States* v. *Hall*, 472 F.2d 261, 265 (5th Cir. 1973). The *Hall* court discussed and distinguished the cases relied upon by the Petitioners: *Alemite Mfg.* v. *Staff*, 42 F.2d 832 (2d Cir. 1930) and *Chase National Bank* v. *City of Norwalk*, 291 U.S. 431 (1934). In these two cases, the actions of outsiders who were non-parties were not enjoined, because their actions did not disturb the rights of both parties according to the provisions of the injunction. 472 F.2d at 264, 265. The *Hall* case arose out of the controversy surrounding a school desegregation case. *Id.* at 262. Hall, a non-party, was convicted of criminal contempt for violating the order, of which he had notice. *Id.* at 264. The conviction was upheld because Hall's actions contributed to the atmosphere of racial tension, and thus threatened the rights and duties of both parties under the temporary restraining order. *Id.* at 265. The court held that "willful violation of that order by one having notice of it constitutes criminal contempt." *Id.* at 268.

Hall supports the principle that certain non-parties who have received notice of an injunction may be bound by its provisions. Mr. Hall was bound by the restraining order, even though he was not a member of the class of students to whom the order was directed. The Petitioners in this case, however, are members of the defendant class, thus providing an additional reason why the Petitioners should be bound by the injunction.

The Petitioners have also cited *NAACP* v. *Claiborne Hardware Co.* to support their Due Process argument, even though the defendants in that case were not certified as a class. 458 U.S. 886 (1982). The class certification distinction aside, however, the Second Appellate District of Ohio has addressed and refuted the Petitioners' Due Process argument.

> Appellants' reliance on *NAACP* v. *Claiborne Hardware Co.* . . . is misplaced: The court's order does not impose liability on members of a class or by reason of mere association. Any liability arises after individual notice and violation of the order.

Dayton Women's Health Ctr. v. *Enix*, 68 Ohio App. 3d 579, 587 (1991) (See Appendix to Petition for Cert. p. 76).

IV.

The Appellate Court did not violate the Due Process rights of the Petitioners by applying the law of the case doctrine.

Petitioners argue that their Due Process rights were violated by the application of the law of the case doctrine. They argue that the application of the doctrine prevented them from challenging the constitutionality of the injunction and from challenging the defendant class certification.

This Court need not address the class certification issue. The Supreme Court of Ohio disposed of this issue on a purely procedural basis, and so it is unnecessary to reach the Due Process issue. Specifically, a trial court order determining that an action shall or shall not be maintained as a class action is a final, appealable order, and a party must appeal such an order within thirty days pursuant to Rule 4(A) of the Ohio Rules of Appellate Procedure. *Dayton Women's Health Center* v. *Enix*, 52 Ohio St. 3d 67, 555 N.E. 2d 956 (1990). Because the class representative did not appeal the order of the trial court certifying the defendant class within the thirty-day time limit, the right of anyone to challenge the certification of the defendant class has been waived.

Once again, the cases cited by the Petitioners are easily distinguished from the facts at bar, and these cases offer little, if any, support for the Petitioners' basic argument. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Founda-*

tion was not a class action case, did not involve an injunction, and the issue of Due Process was not even addressed by this Court. 402 U.S. 313 (1971). "But the case before us involves neither due process nor 'offensive use' questions." *Id.* at 330.

The Petitioners' citation of *Hansberry* v. *Lee* actually supports the position of Respondents. 311 U.S. 32 (1940).

> [T]here is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit.

Id. at 42.

Phillips Petroleum Co. v. *Shutts*, although a class action case, did not concern itself with the enforcement of an injunction. 472 U.S. 797 (1985). Therefore, the principles set forth in that case do not preclude the application of the holding of *United States* v. *Hall*, *supra*, to the facts of this case. This is demonstrated in the opinion of the Second Appellate District.

> The court acted on its inherent power to preserve the effect of its orders and to protect the rights determined therein from intentional interference by other persons.

Dayton Women's Health Center v. *Enix*, 68 Ohio App. 3d 579, 587 (1991) (citing *United States* v. *Hall*, 472 F.2d 261) (*See* Appendix to Petition for Cert., p. 75).

V.

The trial court tailored the provisions of the injunction according to the testimony and evidence presented at the hearings, so as not to conflict with the doctrine of prior restraint.

The Petitioners argue that the injunction conflicts with the doctrine of prior restraints. This position is untenable. No *prior* restraints have been imposed against the Petitioners in

this case. The trial court heard extensive testimony before issuing its injunction. The provisions of the injunction are carefully tailored so as to balance the rights of the respective parties. Unlike the cases cited by the Petitioners, the injunction was not issued *ex parte* (*see Carroll* v. *President of Princess Anne*, 393 U.S. 175 (1968)), nor is the injunction a prior restraint against the publication of documents or distribution of leaflets. *See New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971).

More important than the substance of the Petitioners' argument, however, is the fact that the Petitioners failed to present this argument in the Court of Appeals. (*See* Briefs of Appellants, Case Nos. 11545 and 11637 (combined brief); 11685)). For this reason, the issue of prior restraints was neither considered nor decided by the Second Appellate District. *Dayton Women's Health Center* v. *Enix*, 68 Ohio App. 3d 579 (1991) (*See* Appendix to Petition for Cert., p. 69). Since the issue of prior restraints has not been decided by the court below, this Court should not address this issue. Supreme Court Rules, Rule 10.1.(c).

CONCLUSION

While the nation may be deeply divided over the issue of abortion, this lawsuit does not involve that issue. The case simply revolves around the power of an equity court to balance competing constitutional interests and to protect its substantial interests in keeping streets and sidewalks open and available for the movement of people and property, protecting the safety and convenience of persons using public and private facilities, and ensuring its citizens unimpeded access to medical care. The permanent injunction balances the Petitioners' first amendment rights with the competing constitutional rights of others. The injunction preserves the rights of the Petitioners to engage in open and robust debate about any subject they choose. The restrictions imposed by the trial court do not restrict the content of their speech. It simply imposes reasonable time, place and manner restrictions during those times when they are at the Dayton Women's Health Center or the private offices of its physicians. States must be free to protect their own interests and the rights of all its citizens. Any other conclusion could lead states down the path of chaos.

The trial court's injunction and class certification orders were based on the particular facts of this case. Those orders have passed the scrutiny of both the Montgomery County Court of Appeals and the Ohio Supreme Court and should not be the subject of further inquiry by the United States Supreme Court.

The Petitioners' writ of certiorari should be denied.

Respectfully submitted,

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